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Nos. 577-581, 585-587

In the Supreme Court of the United States

OCTOBER TERM, 1935

RICKERT RICE MILLS, INC., PETITIONER

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA

A. B. DORE, PETITIONER

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA

UNITED RICE MILLING PRODUCTS CO., INC., PETITIONER

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA

BATON ROUGE RICE MILL, INC., PETITIONER

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA

T. SIMON, PETITIONER

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA

LEVY RICE MILLING CO., INC., PETITIONER

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA

FARMERS RICE MILLING CO., INC., PETITIONER

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA

NOBLE-TROTTER RICE MILLING CO., INC., PETITIONER

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING United States Collector of Internal Revenue for the District of Louisiana

No. 587

NOBLE-TROTTER RICE MILLING CO., INC., PETITIONER

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING United States Collector of Internal Revenue for the District of Louisiana

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The United States District Court for the Eastern District of Louisiana, New Orleans Division, rendered no opinion. (No. 577, R. 79–80; No. 578, R. 78–79; No. 579, R. 78–79; No. 580, R. 78–79; No. 581, R. 78–79; No. 585, R. 37; No. 586, R. 78–79; No. 587, R. 78–79.) The order and *per curiam* opinion of the Circuit Court of Appeals for the Fifth Circuit denying the petitioners' motion for preliminary injunctions (No. 577, R. 93; No. 578, R. 93–94; No. 579, R. 93–94; No. 580, R. 93–94; No. 581, R. 93–94; No. 585, R. 51–52; No. 586, R. 93–94; No. 587, R. 93–94) have not been officially reported.

JURISDICTION

These cases were consolidated for hearing in the District Court (No. 577, R. 58). The judgments

and decrees of the District Court were entered October 28, 1935 (No. 577, R. 79; No. 578, R. 78; No. 579, R. 78; No. 580, R. 78; No. 581, R. 78; No. 585, R. 37; No. 586, R. 78; No. 587, R. 78). Motions for preliminary injunctions pending appeal were filed in the Circuit Court of Appeals November 4, 1935, in all the cases except No. 585, in which case the motion for preliminary injunction was filed on November 5. The motions for preliminary injunctions were denied November 5, 1935 (No. 577, R. 87, 93; No. 578, R. 87–93; No. 579, R. 87–93; No. 580, R. 87–93; No. 581, R. 87–93; No. 585, R. 45–51; No. 586, R. 87–93; No. 587, R. 87–93). Petitions for writs of certiorari and motions for injunctions to preserve the *status quo* were filed on November 11, 1935, in cases numbered 577–581, and on November 14, 1935, in cases numbered 585–587.[1] The petitions and motions were granted November 25, 1935. The jurisdiction of this Court has been invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a Federal District Court may enjoin the collection of processing taxes imposed by the

[1] Reference is hereinafter made to the record in case No. 577. The records, petitions for writs of certiorari, and motions for injunctions to preserve the *status quo* in Nos. 577–

Agricultural Adjustment Act as amended, notwithstanding the provisions of Section 21 (a) of that Act, and Section 3224 of the Revised Statutes.

2. Whether the processing taxes imposed upon the petitioners by the Agricultural Adjustment Act as amended constitute a valid exercise of the powers of Congress under the Constitution.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in Part A of the Appendix.

STATEMENT

The petitioners, all of whom are rice processors, filed bills of complaint in equity in the United States District Court for the Eastern District of Louisiana, New Orleans Division, against the respondent, Rufus W. Fontenot, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana, to restrain and enjoin him temporarily and permanently from assessing or collecting any processing tax levied for the month of September 1935, and for subsequent months, under and pursuant to the Agricultural Adjustment Act, as amended August 24, 1935, together with any interest or penalty or imposition of liens (R. 2–26).

The bills of complaint alleged, *inter alia,* that the Agricultural Adjustment Act and its provisions for

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581 and Nos. 585–587, except as to dates and amounts, are substantially identical except as to certain matters not material.

imposing the processing taxes are an attempt by the United States to regulate the production of rice and other agricultural commodities, which is beyond the scope of the powers vested in Congress and violates the Tenth Amendment (R. 12); that the processing taxes were not levied under the taxing power of the United States (R. 13); that the provision for their levy, assessment, and collection violates the provisions of the Fifth Amendment by taking the property of one class of citizens, not for a public purpose but for a private purpose (R. 13); that the Act involves an invalid delegation to the Secretary of Agriculture of powers vested exclusively in Congress by the Constitution (R. 14); that if construed as direct taxes they violate Article I, Section 9, Clause 4, and Article I, Section 2, Clause 3 of the Constitution (R. 14), and that they are not excises and violate the uniformity clause of Article I, Section 8, Clause 1 (R. 14); that the taxes cannot be levied under Article I, Section 8, Clause 3, regulating commerce (R. 14); that the payment of the tax will cause irreparable injury to the petitioners (R. 15–16) and that they have no adequate remedy at law by virtue of Section 21 (d) of the Agricultural Adjustment Act (R. 16–21).

On October 28, 1935, the respondent filed a return to the rule to show cause why the temporary injunctions should not issue, denying the allegations of the bills of complaint other than those re-

lating to his identity as defendant, and averring that the proceeding should be dismissed for the reason that the court had no jurisdiction (R. 56). On the same day the respondent filed a motion to dismiss, alleging, *inter alia,* that Section 3224 of the Revised Statutes and Section 21 (a) of the Agricultural Adjustment Act prohibited the maintenance of any suit for the purpose of restraining the assessment and collection of processing taxes; that the bills of complaint set forth no facts which entitled the petitioners to the relief asked for in a court of equity and that the petitioners had an adequate remedy at law (R. 54).

The petitioners' prayers for preliminary injunctions and the respondent's motion to dismiss were heard by the District Court on October 28, 1935, on which date that court denied the applications for preliminary injunctions, granted the motion to dismiss the bills and entered final decrees dismissing said bills (R. 79–80).

On October 29, 1935, the District Court denied motions for injunctions upon appeals (R. 80), but allowed petitioners appeals to the Circuit Court of Appeals for the Fifth Circuit (R. 81–84). The praecipes for the records on appeal were filed in the Circuit Court of Appeals October 31, 1935 (R. 84). On November 5, 1935, the petitioners' motions for preliminary injunctions pending appeal were denied by the Circuit Court of Appeals (R. 93).

In denying said petitions the court entered a *per curiam* opinion and order in each case, stating that the court was of the opinion that the taxpayers had a remedy at law to recover any taxes illegally exacted, and further that the provisions of the Act as amended deprived the court of jurisdiction to grant injunctive relief (R. 93).

The appeals from the final judgment of the District Court are still awaiting hearing in the Circuit Court of Appeals. On November 11, 1935, in cases numbered 577–581, and on November 14, 1935, in cases numbered 585–587 the petitioners filed in this Court their petitions for writs of certiorari and at the same time filed their motions for injunctions to preserve the *status quo*.

SUMMARY OF ARGUMENT

The prohibition of Section 3224 of the Revised Statutes is made applicable to taxes imposed under the Agricultural Adjustment Act, as amended, by Section 21 (a). Under these provisions the Federal courts are without jurisdiction to restrain or impede the collection of processing taxes. The instant cases do not present any of the situations in which this Court has recognized the prohibition of Section 3224 as being inapplicable.

Section 21 (d) of the Agricultural Adjustment Act, as amended, is a Congressional recognition of the equitable doctrine of unjust enrichment; this doctrine has been recognized and applied both by

the legislative and judicial branches of the Government; and the burden of proof is merely placed upon the person having peculiar knowledge of the facts. It does not deny the petitioners an adequate remedy at law.

No impossible burden of proof is placed on rice processors by Section 21(d). The allegations of fact in the petitioners' bills which were admitted by the motions to dismiss, relate in general to the method of conducting the rice processing business and the method of purchase of the rough rice and the sale of the product. They fail to establish the conclusion that the cost of the product cannot be determined or that it is impossible for the rice miller to prove whether the burden of the tax was shifted. The method of conducting the rice processing business is no more involved than that in many other businesses in which it is possible by modern accounting methods to trace all costs into the product. That it is possible in rice processing is evidenced by the nature of the proof required to recover a refund of tax with respect to rice exports and the fact that numerous such refunds have been made, and further by the agreement of the petitioners, among other millers, to keep such books and records as would demonstrate compliance with the provisions of the "marketing agreement" with the Secretary of Agriculture.

If, as we contend, all costs and the tax can be traced into the product, then the question whether

the burden of the tax was shifted becomes a matter of legal theory which can safely be entrusted to the courts, and there is no impossibility of proof. The matter is no more difficult than in *United States* v. *Jefferson Electric Co.*, 291 U. S. 386. The petitioners' allegations do not demonstrate inadequacy of the remedy but merely emphasize difficulties of proof.

Nor is the remedy rendered inadequate by the fact that no trial *de novo* is granted in the District Court.

Section 21 (d) does to a certain extent remove all necessity for a jury trial by limiting the issues before the District Courts. It is not clear whether this provision removes all fact questions, or merely the question whether the tax has been passed on or back, from determination by a jury.

Under either interpretation the same procedure has been tried and not been found wanting in due process, in customs cases.

Under present conditions, where the collector is obliged to pay over all collections into the Treasury and payment under protest has ceased to be a condition precedent to recovery of taxes paid, there is no basis for a common-law action against the collector. As this Court has held, the remedy is purely statutory and denial of trial by jury and other changes in the method of procedure may be made.

The judicial review provided in this case is adequate, since all questions of law may be raised in the

District Court, including the question whether the Commissioner's findings are supported by substantial evidence. The judicial review is similar to that afforded in cases coming from the Board of Tax Appeals, the Interstate Commerce Commission, the Federal Trade Commission, and reviews of determination of the Secretary of Agriculture under the Packers and Stockyards Act.

Due process of law is not necessarily judicial process. That is particularly true in the field of Federal taxation. An administrative hearing alone is often sufficient to constitute due process and an administrative hearing on the facts, coupled with a judicial hearing on all questions of law, such as is provided here, clearly satisfies all requirements of that clause.

If upon suit for refund it is demonstrated that Section 21 (d) affords no remedy, it would be invalid and the petitioners will have an adequate remedy under the remaining administrative provisions free from the limitations of Section 21 (d).

The taxes imposed by the Agricultural Adjustment Act, as amended, are constitutional. The constitutional objections here made are substantially the same as those presented in *United States* v. *William M. Butler et al.*, No. 401, Present Term. In the Government's brief in that case it is shown that the original Agricultural Adjustment Act is a valid exercise by Congress of its taxing and fiscal powers. The arguments there made are applicable

here. The only difference between that case and this arises by virtue of the amendments of March 18, 1935, and August 24, 1935. These amendments raise new issues relating principally to the question of whether legislative authority has been delegated to the Secretary of Agriculture. The amendments operate to remove the basis of most of the contentions urged in the *Butler* case on the question of delegation. By these amendments Congress imposed a specific rate of tax on the processing of rice and fixed the effective date and period of the tax. The administrative duties relating to the adjustment in the rate are circumscribed. These duties have never been exercised, consequently petitioners are not in a position to object to the adjustment provisions. In any event these provisions contain no abdication of legislative authority, and even if they did, they are separable from the rest of the Act and petitioners have not been injured thereby.

ARGUMENT

While the orders of the court below denying a preliminary injunction pending appeal were interlocutory, the petitioners allege that they were determinative of the whole case, since they were predicated upon the theory that the petitioners have a remedy at law and that the provisions of the Agricultural Adjustment Act, as amended, deprived the court of jurisdiction. The petitioners seek to have this Court review the orders of the District Court dismissing the bills for injunction. We con-

tend that this action of the District Court was correct, since that court is expressly prohibited by law from granting the injunctive relief sought. The various aspects of the questions involved in these cases have been discussed in a number of cases in the lower Federal courts. For the convenience of the Court these opinions have been collected and the points passed upon have been noted in Part G of the Appendix.

I

The Petitioners Are Not Entitled to the Injunctive Relief Sought

(A) The Maintenance of These Suits Is Prohibited by Section 3224 of the Revised Statutes and Section 21 (a) of the Agricultural Adjustment Act, as Amended

By these suits the petitioners seek to enjoin the collection of processing taxes imposed upon the processing of rough rice by the Agricultural Adjustment Act, as amended. The maintenance of these suits is prohibited by Section 21 (a) of the Agricultural Adjustment Act, as amended, which provides that:

> No suit, action, or proceeding * * * shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment.

This subdivision of the Act makes the prohibition contained in Section 3224 of the Revised Statutes [2] specifically applicable to the processing taxes imposed by the Agricultural Adjustment Act, as amended.

This prohibition against an injunction must be considered in the light of the traditional policy governing the collection of taxes because it is but an integral part of the system of taxation embraced under, and established pursuant to, that policy. The policy is so well established by decisions of this Court as to require but brief mention. Taxes are "the sole means by which sovereignties can maintain their existence." *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146. Summary collection is necessary so that funds may be always available to defray public expenses. For, as stated in *Bull* v. *United States,* 295 U. S. 247, 259, "taxes are the lifeblood of government, and their prompt and certain availability an imperious need." To meet that need it is essential that taxpayers be required to pay first and litigate later. It is upon this principle that the whole scheme of Federal taxation rests, and upon which it has rested since the founding of the Government. As stated in *Phillips* v. *Commissioner,* 283 U. S. 589, 595, "The right of the United States to collect its internal revenue by summary administrative proceedings

[2] See Part A of the Appendix.

has long been settled."[3] Section 3224 was enacted by the Congress for the frank purpose, as has been recognized by this Court, of removing from the judicial branch of the Government the general power to stop or impede the collection of taxes. *Cheatham* v. *United States,* 92 U. S. 85, 89.

Prior to the enactment in 1867 of the statutory predecessor of Section 3224,[4] this Court, in recognition of the general equity rule, had recognized the impropriety of interfering with the assessment and collection of taxes. See *Miller* v. *Nut Margarine Co.,* 284 U. S. 498, 509; *Hannewinkle* v. *Georgetown,* 15 Wall. 547, citing with approval, *Moors* v. *Smedley,* 6 Johns. Ch. 28. Likewise, this Court has sustained and given effect to Section 3224 in every case where an injunction has been sought to prevent the collection of a Federal tax. *Graham* v. *Du Pont,* 262 U. S. 234; *Bailey* v. *George,* 259 U. S. 16; *Dodge* v. *Osborn,* 240 U. S. 118, 121; *Snyder* v. *Marks,* 109 U. S. 189, 191. See *Miller* v. *Nut Margarine Co., supra.* Cf. *Florida* v. *Mellon,* 273 U. S. 12; *Dodge* v. *Brady,* 240 U. S. 122. It is true, as this Court pointed out in the *Nut Margarine* case, *supra* (pp. 509–510), that the statute does not operate as an absolute prohibition in cases involving extraordinary and exceptional circum-

[3] See *Dows* v. *City of Chicago,* 11 Wall. 108; *State Railroad Tax Cases,* 92 U. S. 575, 613; *Springer* v. *United States,* 102 U. S. 586, 593, 594; *Dodge* v. *Osborn,* 240 U. S. 118, 120; *Nichols* v. *United States,* 7 Wall. 122.

[4] The Act of March 2, 1867, c. 169, 14 Stat. 471, 475.

stances. It is within that exception that the petitioners seek to bring these cases. This necessitates an examination of the exceptions established by the decisions of this Court as well as the situations which have been declared not to be extraordinary and exceptional.

The present suits are not comparable in any way to the situations in which the statute has been held inapplicable by this Court. These cases may be put in three classes. First are those in which the tax is construed to be a criminal penalty in the nature of a fine. *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Co.* v. *Wardell*, 260 U. S. 386. In that situation the constitutional guarantees against inflicting criminal punishment without hearing, information, indictment, trial by jury, etc., require that Section 3224 be construed as inapplicable. Clearly, the present cases cannot fall within that category. Congress has not designated certain conduct as criminal, with a "tax" in case the statutory mandate is violated. *Lipke* v. *Lederer*, *supra*, did not hold that a tax which may be invalid as an attempted regulation is without the scope of Section 3224, for *Bailey* v. *George*, *supra*, which had been decided only three weeks before, had settled that question differently by holding that the collection of an unconstitutional tax could not be enjoined. There is no suggestion in *Lipke* v. *Lederer* that *Bailey* v. *George* was being overruled.

The second exception to the operation of Section 3224 involves the cases in which a stockholder was allowed to enjoin his corporation from paying the tax in a manner such that there could be no suit to recover it. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1; *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103. The theory underlying Section 3224 is that a taxpayer is fully protected by paying the tax under protest and bringing suit for refund. But a stockholder cannot pay his corporation's taxes and sue for a refund; his interest can be protected only through the corporation. In the above cases, however, the corporations were threatening to pay the taxes *voluntarily,* and under existing law there could be no suits for refund.[5] See *Reinecke* v. *Peacock,* 3 F. (2d) 583, 586 (C. C. A. 7th), certiorari denied, 268 U. S. 699; *Gouge* v. *Hart,* 250 Fed. 802, 804-805 (W. D. Va.), appeal dismissed, 251 U. S. 542. The inapplicability of Section 3224 rested therefore upon the ground that the alternative remedy at law contemplated by Section 3224 was impossible. Unless petitioners have no other remedy in the present cases, which, as will be shown below (pp. ———), is not the fact, the present cases obviously do not fall within this category.

[5] It was not until Section 1014 of the Revenue Act of 1924, c. 234, 43 Stat. 253, amended Section 3226, Revised Statutes, that suits for refund could be maintained whether or not the tax had been paid under protest. See *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373.

The third exception to the operation of Section 3224 is the situation in which the hardship on the particular taxpayer is so great, and the circumstances of the case are so extraordinary, that relief is allowed. *Miller* v. *Nut Margarine Co.*, 284 U. S. 498. Cf. *Hill* v. *Wallace*, 259 U. S. 44. In the *Nut Margarine* case no tax was imposed by law upon the article sought to be taxed. Several Federal district courts had so held, and no appeal had been taken from those decisions. Failure to grant the injunction would have resulted in the complete ruin of the taxpayer and would have destroyed a business built up on the assurance of the taxing authorities that its products were in fact exempt from the tax.

Finally, it should be noted that *Hill* v. *Wallace*, 259 U. S. 44, in no manner limits the scope of Section 3224. There the bill alleged that the directors of the Board of Trade were about to apply to the Secretary of Agriculture for designation as a "contract market." Such a designation would have avoided the tax. The suit, brought by members who objected to the conditions imposed by the Act upon contract markets, was not one to enjoin the payment of a tax, for the directors were proposing to render the transactions tax exempt. Section 3224, designed to expedite revenue collections, was plainly inapplicable.

Moreover, although the tax in *Hill* v. *Wallace* was held invalid as an unconstitutional regulation, it is

clear that the failure to apply Section 3224 did not turn upon that fact, for *Bailey* v. *George, supra,* in which a similar allegation with regard to the child-labor tax was made, was decided upon the same day and held Section 3224 applicable.

The Court has never defined the "special and extraordinary circumstances" which will remove a suit from the prohibition of Section 3224. However, if the facts of the *Nut Margarine* case, or *Hill* v. *Wallace,* may be taken as typical of such circumstances, it is clear that the present suits do not fall in that category, and that the petitioners should be restricted to their remedy of paying the taxes levied under the Act, and contesting their validity by suits for refund under Section 21 (d) of the present Act.

In view of the foregoing discussion, it is submitted that the petitioners have not brought these cases within any established or permissible exceptions to Section 3224.

One of the grounds relied upon by petitioners as showing extraordinary and exceptional circumstances is the contention that the provisions of the Agricultural Adjustment Act, as amended, are unconstitutional (Br. 39). We will demonstrate, herein below, that this contention is clearly erroneous. However, unconstitutionality of the taxing provisions is no ground for injunctive relief. In *Bailey* v. *George, supra,* this Court held that Section 3224 forbade an injunction to prevent the col-

lection of the child labor tax, even though on the same day, in the *Child Labor Tax Case,* 259 U. S. 20, the same statute was held unconstitutional. In *Snyder* v. *Marks,* supra, the Court stated (p. 192):

> There is, therefore, no force in the suggestion that Section 3224, in speaking of a "tax", means only a legal tax; and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained.

It is clear, therefore, that neither the invalidity of a tax nor the unconstitutionality of the Act imposing it may be tested in a suit to enjoin the collection thereof. See also, *Dodge* v. *Osborn, supra.* Cf. *Phillips* v. *Commissioner, supra.*

The petitioners further urge in support of the equity jurisdiction of the courts that recovery of the processing taxes, if paid, will result in a multiplicity of suits; that there has been no appropriation for payment of any refunds determined by the courts to be due; that Section 21 (d) of the Agricultural Adjustment Act, as amended, has never been interpreted by the courts; and the existence of a possible liability for civil and criminal penalties provided by Section 19 (b) of the Act, as amended (Br. 28–29).

These contentions are without merit. Petitioners have not set up any facts, other than mere general allegations, to show how a multiplicity of suits will occur. The provisions for suit to recover Fed-

eral taxes erroneously or illegally collected, including the processing taxes, do not give rise to a multiplicity of suits of the character which equity will intervene to prevent. See *Dodge* v. *Osborn,* 240 U. S. 118; *Dodge* v. *Brady,* 240 U. S. 122; *City of Seattle* v. *Poe,* 4 F. (2d) 276 (W. D. Wash.); *French Mortgage & Bond Co.* v. *Woodworth,* 38 F. (2d) 841 (E. D. Mich.); and *Fisher Flouring Mills Co.* v. *Vierhus,* 78 F. (2d) 889, 893 (C. C. A. 9th). While returns must be made and the tax paid monthly, it is not necessary for a separate suit to be brought for each monthly payment. Except in the event the Agricultural Adjustment Act is adjudged unconstitutional (in which event refund claims must be filed and suit brought within the time specified in Section 21 (d) (2)), taxpayers have four years from date of payment in which to file their refund claims and two years from the Commissioner's rejection thereof in which to bring suit. Section 19 (b), and Revised Statutes, Section 3220, and Section 3228 as amended by Section 1106 (a) of the Revenue Act of 1932. Claims for refund under Sections 15 and 17 must be filed within one year from date of payment or one year from the date of adoption of Public No. 320 on August 24, 1935. See Section 21 (b). One suit may be brought for the recovery of all taxes not barred by the statute of limitations. *Fisher Flouring Mills Co.* v. *Vierhus, supra.* This is common practice in suing for recovery of Federal taxes

collected periodically, including manufacturers' excise taxes. Cf. *United States* v. *Jefferson Electric Co.*, 291 U. S. 386.

The cases cited by petitioners (*Wilson* v. *Ill. So. Ry.*, 263 U. S. 574; *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20) involve state taxes and are not in point. This Court did not sustain equity jurisdiction in those cases solely upon the ground that a multiplicity of suits would otherwise result. Furthermore, it is clear from those cases that the multiplicity of suits which equity will intervene to prevent is a number of suits by or against different individuals in different forms arising out of the same transaction. Cf. *Hill* v. *Wallace*, 259 U. S. 44. Equitable relief against a multiplicity of suits should be given only if the petitioner is threatened with continuous and vexatious litigation (*Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276; *United States* v. *Bitter Root Co.*, 200 U. S. 451; *Hale* v. *Allinson*, 188 U. S. 56), and not when the number of suits is within the complete control of the petitioner himself and no hardship will result from combining all his claims in one suit. (See *Matthews* v. *Rodgers*, 284 U. S. 521, 529–530.)

No facts are alleged which would bring these cases within this Court's decision in *Stewart Dry Goods Co.* v. *Lewis*, 287 U. S. 9, where it appeared that there might be no funds with which to [illegible] a judgment. In view of Section 989 of the Revised

Statutes (U. S. C., Title 26, Sec. 842), and the provisions of law (Act of April 27, 1904, c. 1630, Sec. 1, 33 Stat. 394, 422; U. S. C., Title 31, Sec. 583 (2)) requiring that estimates be submitted to Congress for appropriations to pay judgments against the United States, there is no justification for granting equitable relief on the ground that no appropriation has been made to cover refunds of processing taxes erroneously collected. Furthermore, it would seem that any such contention is premature in view of the fact that the Act has not been declared unconstitutional.

Likewise, the cases relied upon in support of the argument that relief should be granted because Section 21 (d) of the Act has not been construed are not in point. The cases cited (*Atlantic Coast Line* v. *Daughton,* 262 U. S. 413; *Union Pac. R. R. Co.* v. *Weld County,* 247 U. S. 282), as well as several others which may be mentioned, involve the application of State law, and indicate that this Court will not attempt a construction of a State statute which admittedly would not be binding upon the State court. The situation is entirely different where the construction of a Federal statute is involved. Section 21 (d) of the Act is to be construed by the Federal courts and not by any State court. If the District Court is going to be permitted to take jurisdiction on the ground that there is no adequate remedy at law, it must first construe Section 21 (d) to deny an adequate remedy, and it

cannot properly do so except in a suit for refund. If its validity in any particular cannot be sustained in such a suit, taxpayers will not be required to comply with the objectionable provisions.

The penalties to which taxpayers are subjected by the provision of Section 19 (b) of the Act are the same as the penalties prescribed for failure to file returns and for the filing of false or fraudulent returns in the case of other excise taxes. They can all be avoided by complying with the provisions requiring the return and payment of taxes and do not present any ground for equitable jurisdiction or injunctive relief. *Fisher Flouring Mills Co.* v. *Vierhus, supra* (p. 892). The cases cited in support of this argument are not in point. In *Ex parte Young,* 209 U. S. 123, the objectionable penalties were criminal penalties imposed for refusing to comply with a State law regulating transportation rates. *Wallace* v. *Hines,* 253 U. S. 66, was a case involving taxes imposed upon railroads by the State of North Dakota. The opinion does not indicate the nature of the penalties imposed for failure to pay, but merely indicates that since the tax was made a first lien upon the taxpayer's property, it cast a cloud upon the title, and that fact, plus the fact that penalties were imposed for delay in payment, was sufficient to give the Federal courts equity jurisdiction.

It is clear that Section 21 (a) is but a specific application of the prohibition of Section 3224 to the

taxes imposed under the Agricultural Adjustment Act, subsequent to the amendment thereof by the Act of August 24, 1935. Therefore, it removes any doubt, if any existed, as to the applicability of Section 3224 to the present cases. This statute is not out of line with the construction placed upon Section 3224 by the courts. Cf. *Stafford Mills* v. *White,* 41 F. (2d) 58 (Mass.); *Czieslik* v. *Burnet,* 57 F. (2d) 715 (E. D. N. Y.) See also *Howland* v. *Soule,* Fed. Cas. No. 6800 (C. C. Calif.); *United States* v. *Pacific Railroad,* Fed. Cas. No. 15983 (C. C. E. D. Mo.); *Miles* v. *Johnson,* 59 Fed. 38 (C. C. Ky.); *Waldron* v. *Poe,* 1 F. (2d) 932 (W. D. Wash.); *Staley* v. *Hopkins,* 9 F. (2d) 976 (N. D. Tex.); *Ralston* v. *Heiner,* 24 F. (2d) 416 (C. C. A. 3d); *Calkins* v. *Smietanka,* 240 Fed. 138 (N. D. Ill.); *Black* v. *Rafferty,* 287 Fed. 937 (E. D. N. Y.).

(B) Section 21 (d) of the Agricultural Adjustment Act, as Amended, Does Not Deprive Petitioners of a Plain, Adequate, and Complete Remedy at Law

Petitioners strongly urge that Section 21 (d) of the Act, as amended, deprives them of an adequate remedy at law and thereby creates such extraordinary and exceptional circumstances as to justify injunctive relief. That subdivision provides in substance that no recovery shall be allowed of the amount of any tax imposed by the Agricultural Adjustment Act unless it shall be established to the satisfaction of the Commissioner that the claimant has not directly or indirectly included that amount

in the price of the article with respect to which it was imposed, or of any article processed therefrom, or passed on any part of such amount to the vendee, or included any part in the processing fee, and that the price paid by the claimant was not reduced by any part of such amount, and further provides the procedure for the hearing before the Commissioner and a court review thereof.

We will show (1) that Section 21 (d) merely adopts the equitable principle of unjust enrichment; (2) that it does not impose an impossible burden of proof upon rice processors; (3) that it does not deprive such processors of an adequate remedy at law by the fact that no trial *de novo* is granted by the District Court, and (4) even if the section were invalid on any of these grounds, nevertheless petitioners would have an adequate remedy at law under Section 3226 of the Revised Statutes and related provisions. These points will be discussed in the order named.

1. This statute is a Congressional recognition and application of the equitable doctrine of unjust enrichment

The Agricultural Adjustment Act has always contained adequate provisions for the administrative consideration of claims for the refund of processing taxes alleged to have been illegally exacted and for suit at law in the event of rejection of such claims for refund in whole or in part. Section 19 (b), by reference to Section 600, Revenue

Act of 1926, c. 27, 44 Stat. 9, and Section 626, Revenue Act of 1932, c. 209, 47 Stat. 169, makes applicable Sections 3220, 3226, and 3228 of the Revised Statutes, as amended (Part A of the Appendix), and affords to taxpayers under the Act all of the remedies which any taxpayer has ever had for the recovery of taxes erroneously or illegally collected. Section 21 (d) has not deprived the petitioners of any of these remedies but has only added an additional element to the right to a refund, and in line with precedent, has required the claimant to show that he is justly entitled to repayment of the exaction.

Processing taxes are usually either passed on to the ultimate consumer or back to the producer.[6] This is apparently true of the processing tax on rice. An examination of the average farm price for rough rice during the months of April to No-

[6] The processing tax imposed by the Agricultural Adjustment Act upon basic agricultural commodities and competing commodities is an excise as that term is used and applied in our system of Federal internal revenue taxation. See pp. 29–32 in the Government's brief in *United States* v. *William M. Butler*, et al., No. 401, Present Term. One of the recognized characteristics of excise taxes (also known as indirect taxes) is that while they are imposed in the first instance upon the dealer, producer, or manufacturer, the economic burden of the levy can be, and generally is, shifted to the ultimate user or consumer. This characteristic of excise taxes is widely discussed and generally agreed upon by leading economists and text writers. See Marshall, "Principles of Economics" (8th Ed.), pp. 413–414; Seligman, "Incidence of Taxation" (1927), pp. 23, 30–62, 77–78, 217–254, 339–355; and "Studies in Public Finance" (1925),

vember, 1935, inclusive, and of the "spread" between prices paid the rice producer and those received upon the sale of the standard product, strongly indicates the fact that the tax was actually in part taken out of the producer and in part passed on to the consumer. A study of the market prices of "Fancy Blue Rose Rice" in connection with prices paid producers for Louisiana rice is used for the purpose of this examination. (See Tables I to III of Part E of the Appendix.) "Blue Rose Rice", in 1933, the last year for which there are published statistics in this respect, comprised about 66 per cent of the southern production and 84 per cent of the Louisiana production of all rice. "Fancy Blue Rose" is the most important standard grade of "Blue Rose" rice. The tables referred to show the following: The range of the monthly spread between the price per 100 pounds of

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p. 136; Taussig, "Principles of Economics" (3d Ed., 1930), Vol. II, c. 71; Adams, "Science of Finance" (1899), pp. 383–393; Brown, "The Economics of Taxation" (1924), c. III and IV; Paton, "The Pro and Con of a Sales Tax", Vol. II, p. 368; Green, "Theory and Practice of Modern Taxation" (1933), pp. 130–132; Burton, "The Sales Tax" (10th Ed., 1927). See also Hearings Before the Finance Committee of the United States Senate on the Revenue Bill of 1921, pp. 418, 466. All of the economic authorities cited by the petitioners in Appendix E to their brief recognize the tendency to shift the burden of indirect taxes. The "acrimonious debate" among economists referred to by the petitioners (Br. 19) is directed not so much to the shifting of the burden of taxes as it is to the determination of the ultimate incidence.

"Fancy Blue Rose" at New Orleans, Louisiana, and the farm price per barrel of 162 pounds of Louisiana rice is as follows:

Crop year August-July	Low	High
1928-1929	$0.54	$1.05
1929-1930	.41	.97
1930-1931	.72	1.33
1931-1932	.34	1.43
1932-1933	.39	.78
1933-1934	.95	1.17
1934-1935	.43	1.18
1935-1936 (August-November)	1.41	2.37

Statistics provided by the industry show that 162 pounds of rough rice will produce 100 pounds of head rice and 13 pounds of broken rices. It is obvious that the processor cannot stay in business and pay a tax of $1.62 per barrel of rough rice out of a spread running between $.34 per 100 pounds and $1.43 per 100 pounds of head rice produced therefrom, nor can the balance be made up out of 13 pounds of a cheaper byproduct. He must do one of two things: Either pay less for his rough rice (take the tax out of the price to the producer) or sell the clean rice for a higher price (pass the tax on to the consumer). The available data indicate that, in the case of rice and its products, the processor has in part taken the processing tax out of the price paid the producer and has in part passed the tax on.

On the fifteenth of April, May, June, and July, 1935, the average farm price for rough rice in Louisiana was $3.10, $3.13, $3.24, and $3.17, per bar-

rel of 162 pounds, respectively. On August 15, in anticipation of the tax, the price dropped to $2.66 per barrel, and in September the farm price was $1.73 per barrel. The farm price for October and November has been $1.98 and $2.34 per barrel, respectively. (See Table I, Part E of the Appendix.)

With respect to the passing on of the tax, the data show that after April 1, 1935, the effective date of the processing tax on rice, when the spread was $.66, and partly in anticipation of the effectiveness of the tax in September, the spread began to increase. From April 1 to September 1 virtually no tax was collected, since tax-payment warrants had been issued to cover all rice produced in the 1933 and 1934 crops. (Cf. Section 15 (b–1), (b–2), Agricultural Adjustment Act, as amended. See Compilation from the monthly reports of the Bureau of Internal Revenue to the Agricultural Adjustment Administration, periodically published by the Agricultural Adjustment Administration, Part C of the Appendix.) Consequently, the New Orleans price would not have reflected the tax during that period. But beginning September 1st, the tax began to be paid in substantial amounts on the 1935 crop and immediately the spread increased the full difference between the April spread of $.66 and the same spread plus the tax. The spread for September was $2.37 and for October $2.30. Such a spread between the price of clean and rough rice

is obviously an unusually wide spread. It is a reasonable inference, therefore, to conclude that the change from April 15 to September 15 resulted from imposition of the tax.

Thus we have a situation where the persons subject to the tax are able to, and generally do, reimburse themselves for the taxes paid.[7] Section 21 (d) is an effort to deal with this situation in an equitable and just manner.[8] The petitioners would, if their contentions should prevail, be unjustly enriched to the extent of any taxes passed on or back. After having paid the tax and secured reimbursement from the producers or consumers, they would then recover back from the Government the amount of the tax paid. Hence, instead of being hurt by the tax, processors would become a favored class at the expense of producers and consumers to the extent of the amount of the tax. The amount re-

[7] In *Texas Co.* v. *Brown*, 258 U. S. 466, 479–480, this Court took occasion to remark:

> The self-interest of the dealer and the customs of trade are relied upon to add the tax to the price of the product, and thus pass it on to the ultimate consumer—a method appropriate in indirect taxation, and certainly a not unreasonable mode of distributing the burden among those who share in the benefits.

[8] The object of Congress in limiting refunds by Section 21 (d) to that portion of the tax actually borne by the processor is clear. As stated in the report of the conferees (H. Rep. No. 1757, 74th Cong., 1st Sess., p. 32): "This provision embodies a doctrine that no taxpayer should be unjustly enriched by a return of the tax if, in fact, he has not borne it."

covered from the Government would be a windfall. Nevertheless, the effect of the petitioners' contentions would be to declare invalid or inapplicable a statute which has the effect of requiring processors to demonstrate by proof the fact that they have absorbed the tax and, consequently, have not been unjustly enriched.

The doctrine of unjust enrichment is not novel and is one of general application. Cf. *Brooks* v. *Martin,* 2 Wall. 70. It has been applied by the courts in the absence of any statute embodying the doctrine. This Court applied it in *Perry* v. *United States,* 294 U. S. 330. In that case the Court said (pp. 357–358) that:

> Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever. On the contrary, in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, *the payment to the plaintiff of the amount which he demands would appear to constitute not a recoupment of loss in any proper sense but an unjustified enrichment.* (Italics supplied.)

The doctrine was likewise in effect applied in *White* v. *Stone,* 78 F. (2d) 136 (C. C. A. 1st), certiorari denied October 14, 1935; *Champ Spring*

Co. v. *United States,* 47 F. (2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852; *State* v. *Canfield Oil Co.,* 34 Ohio App. 267, 275. See Field, The Effect Of An Unconstitutional Statute (1935), pp. 254–255. The doctrine has been applied in construing statutes. *People* v. *Ventura Refining Co.,* 204 Cal. 286. See *Standard Oil Co.* v. *United States,* 5 F. Supp. 976, 985 (C. Cls.), certiorari denied, 293 U. S. 599. Cf. *Lewis* v. *Reynolds,* 284 U. S. 281. And a statute embodying the doctrine was upheld by this Court in *United States* v. *Jefferson Electric Co.,* 291 U. S. 386.

This doctrine has been applied in suits in equity wherein taxpayers who have passed the taxes on to the consumers have sought to recover the amount of taxes paid the collector. In these cases the doctrine has formed the basis for holding that the complainants had not come into equity with clean hands. *Richardson Lubricating Co.* v. *Kinney,* 337 Ill. 122, 129–130; *Standard Oil Co.* v. *Bollinger,* 337 Ill. 353, 357.

Suits for the refund of taxes are governed by general equitable considerations and there is nothing novel about a statute adopting the equitable doctrine of unjust enrichment to suits for the refund of taxes paid. *United States* v. *Jefferson Electric Co., supra* (pp. 402–403). It was there pointed out that if the taxpayer had shifted the burden of a tax to the purchasers of an article, then

the taxpayer had not been an actual sufferer (p. 402). It seems clear that Section 21 (d) of the Agricultural Adjustment Act, as amended, which applies this equitable doctrine to suits for the refund of taxes paid under the Act, is not invalid. The statute clearly contemplates that a recovery may be had where the processor has himself been hurt, i. e., where the processor has borne the burden of the tax. It also seems clear that the statute has denied the right to recover to those processors who have not been hurt. It is also clear that those processors who have reimbursed themselves for the amount of the taxes paid from either the consumers or the producers have not been hurt by the exaction. In the case of this latter class of processors, the persons who have sustained loss by reason of the exaction are either the consumers, who were forced to reimburse the processors through the addition of the amount of the tax to the price of the commodities, or the producers, who received prices for their raw products which have been reduced by the amount of the tax.[9]

This is not a case of unjust enrichment as between the Government and the processors. If the

[9] Neither the consumers nor the producers would, in the absence of a statute or a specific contract to that effect, have any right of action against the processor. There is no statute giving them such a right. *Heckman & Co.* v. *I. S. Dawes & Son Co.*, 12 F. (2d) 154 (App. D. C.). See also *Williams* v. *Riley*, 280 U. S. 78; *Central Transfer Co.* v. *Commercial Oil Co.*, 45 F. (2d) 400 (E. D. Mo.); *Kastner* v. *Duffy-Mott Co.*, 125 Misc. Rep. 886, 213 N. Y. S. 128.

taxes are paid over to and retained by the Government it will not be unjustly enriched at the expense of the processors. In this respect the instant cases are quite different from *Bull* v. *United States,* 295 U. S. 247. In that case this Court held that the United States would be unjustly enriched by the retention of the tax there involved. It is obvious from the facts that the Government would have been so enriched *at the expense of and to the detriment of the plaintiff taxpayer.* If it is a question whether the Government or private individuals or corporations shall have the benefit of sums wrongfully collected from third parties under the color of a statute, the Government must prevail. This conclusion was apparently sanctioned by this Court in *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, 484.

As between the Government and the processors, we submit that the Government must prevail on the ground of a plain public policy. To permit the processors to recover or retain the amount of the tax which has been passed on or back would result in the unjust enrichment of a small class of private citizens, i. e., the processors, at the expense of a vastly larger class, i. e., the producers and consumers. Of course, if the processors should prevail, the amount of the taxes would be used by them for their individual uses and benefits. On the other hand, if, as between the two, the Government should prevail, the amount of the tax would be held and

expended for Governmental purposes, which would redound to the benefit of the country as a whole. Also, if the money is retained by, or paid over to, the Government it would be possible for the Congress, should it decide to do so, to take steps to return the money to those from whom it was collected, i. e., the producers and consumers.[10] Therefore, we submit that Section 21 (d) is thoroughly justified on this ground.[11]

Under the cases above referred to, the equitable doctrine of unjust enrichment is an affirmative defense which must be raised by an appropriate pleading and proved. Aside from Section 21 (d) this defense would be available to the Government in a suit for refund brought by a processor under Section 3226 of the Revised Statutes. As has been pointed out above, Section 21 (d) is a statutory embodiment of that doctrine. However, in addition to adopting the doctrine, this statute regulates the use thereof by shifting the burden of proof from the Government. This phase of the statute is reasonable and just in that it merely places the

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[10] This type of procedure was followed by the Congress in making appropriations for the refund of excise taxes in the years 1927 and 1928. See footnote 12, *infra.*

[11] The title to the money may be supported in the Government on the ground of superior right (see *Dayton-Goose Creek Ry.* v. *United States*, *supra*) by analogy to the doctrine of escheat, which is, in itself, a rather broad doctrine in America (see 2 Minor On Real Estate (2d Ed.), p. 1151) and is largely regulated by statute (Stimson, American Statute Law, Sections 1151, 1157).

burden of proof upon the party who has peculiar knowledge of the facts and who has those facts within his control. Hence, the statute merely includes in the equitable doctrine a general, salutary, and well-settled rule of evidence. See *Selma, Rome, etc., Railroad* v. *United States,* 139 U. S. 560, 566–568. There is nothing novel about such a statute.[12] In this respect, Section 21 (d) is comparable to Section 424 of the Revenue Act of 1928 and Section 621 of the Revenue Act of 1932 (c. 209, 47 Stat. 169, 267). The provision of the Revenue Act of 1928 has been upheld and approved as an additional element of the right to a refund. *United States* v. *Jefferson Electric Co.,* 291 U. S. 386; *Jefferson Electric Mfg. Co.* v. *United States,* 10 Fed. Supp. 950 (C. Cls.); *Virginia-Carolina Rubber Co.* v. *United States,* 7 Fed. Supp. 299 (C. Cls.). The

[12] Familiar examples appear with respect to certain manufacturers' excise taxes where Congress has provided that in instances where agreements or contracts have been entered into prior to the effective date of the tax for the sale or lease of an article subject to the tax, any new or additional liability must be discharged by the purchaser, while any reduction in liability shall be recovered by the purchaser. See Revenue Act of 1917, c. 63, 40 Stat. 300, Sec. 1007; Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 1312; Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 906; Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 605; Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 603; Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 423; Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 625, as amended by Pub. Res. No. 25, approved June 13, 1932, c. 246, 47 Stat. 302. For administrative recognition of this feature respecting excises, see Regulations 47, Articles

burden of proof placed on processors by Section 21 (d) is not unlike the burden of proof placed upon parties litigant in other situations. However, if this section be treated as one creating a *prima facie* presumption, it is not objectionable.[13]

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3 and 40, under the Revenue Act of 1921; Regulations 48, Article 1, under the Revenue Act of 1924; Regulations 52, Articles 8 and 34, under the Revenue Acts of 1918 and 1921; and Regulations 54, Articles 6 and 35, under Revenue Act of 1918. In making appropriations in 1927 and 1928 for the refund of internal-revenue taxes erroneously and illegally collected, Congress provided that no part of such appropriations should be available to refund any amount collected under those sections unless the taxpayer should furnish a bond conditioned upon the repayment to the Government of any amount of such refund not distributed within six months to the person who purchased for consumption the article upon which the refund was made. See c. 226, 44 Stat. 1250, 1254; c. 5, 45 Stat. 2, 30; c. 126, 45 Stat. 162, 169. These provisions were superseded by Section 424 of the Revenue Act of 1928, *supra*. See particularly H. Rep. No. 2, 70th Cong., 1st Sess., p. 27; H. Rep. No. 708, 72d Cong., 1st Sess., p. 39.

[13] For example: Proof of March 1, 1913, value is frequently necessary in order to overcome the presumption of the correctness of the Commissioner's determination in income tax cases (*Wickwire* v. *Reinecke*, 275 U. S. 101, 105); there is a presumption of death after seven years' absence unexplained and without communication (*Davie* v. *Briggs*, 97 U. S. 628, 633); presumption of negligence on proof of injury by a railroad established by State statute was approved in *Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U. S. 35, 41. Other Federal statutes create presumptions difficult to overcome. In establishing pension claims, seven years of unexplained absence raises a *prima facie* presumption of death. Act of March 13, 1896, c. 54, 29 Stat. 57 (U. S. C., Title 38, Sec. 32). There is a presumption that all opium found in the United States is imported contrary to law, and possession of opium is *prima facie* proof of illegal transactions in

It is asserted that because of the use in Section 21 (d) of the words "any part of such amount" it must follow that a processor who is able to prove that he absorbed 99% of the tax would nevertheless be precluded from recovery because the balance was passed on. We submit that the section is not subject to such a strained construction. It is apparent from the Act that "passed on any part of such amount" and kindred phrases refer to the amount to be refunded. In other words, *any amount* which has not been passed on or passed back shall be refunded. The discussion on the floor of the Senate discloses that Congress intended that the section should be given a fair and liberal interpretation. Cong. Rec., 74th Cong. 1st Sess., Vol. 79, No. 169, pp. 13700–13702 (Part F of the Appendix). And this is the interpretation which is being given the statute by the Executive Department charged with the enforcement of the law.

2. *Section 21 (d) does not impose an impossible burden of proof.*

In support of their contention that Section 21 (d) deprives them of a remedy at law, the petitioners make certain allegations of fact concerning the method of conducting the rice processing busi-

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connection therewith. Act of January 17, 1914, c. 9, 38 Stat. 275 (U. S. C., Title 21, Sec. 174). Possession of narcotics on which the tax has not been paid is presumptive evidence of unlawful traffic in connection therewith. Act of December 17, 1914, c. 1, 38 Stat. 785, 789, Section 8 (U. S. C., Title 26, Secs. 1387–1388 (c)).

ness in general and the method of purchase of the rough rice and the sale of the product, from which they attempt to draw the conclusion that rice millers are unable in any case to determine the cost of any particular lot of their product and that it is impossible to prove whether or not the burden of the tax was shifted to the purchaser or the producer, or was borne by the miller. It is contended that by the motion to dismiss, the conclusion of inability to show the cost of the product, and the conclusion that it is impossible to prove whether or not the burden was shifted, have been admitted. But a motion to dismiss, like a demurrer, admits only facts well pleaded, and not conclusions. *Pacific States Box and Basket Co.* v. *White,* decided by this Court November 18, 1935.

We submit that the allegations of fact concerning the method of rice processing and the conditions under which the rough rice is purchased and the product sold do not establish either the conclusion that the cost of the product cannot be determined or that it is impossible to prove whether the burden of the tax was shifted. The petitioners do not predicate their argument upon the ground that there is no available evidence upon which to determine these questions, but, rather, that, given all of the available evidence, the Commissioner or a court could not reach any intelligent result. Given all the facts, we submit that any court could arrive at a fair and reasonable conclusion.

The method of conducting the rice processing business, the purchase and milling of rough rice and the sale of the product are no more involved than are the equivalent factors present in many other present-day manufacturing businesses, in which it is possible by modern accounting systems, where sufficiently exhaustive and accurate records are maintained, to trace both direct and indirect costs into the finished products.[14] The allegations of petitioners' bills bear a striking resemblance to those in *Anton Rieder* v. *Rogan, Collector* (S. D. Cal.), in which a bill to enjoin the collecting of hog processing taxes was dismissed by the District Court for the Southern District of California on October 28, 1935.[15] There the court said, in part:

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[14] Compare "Cost Accounting", by Dohr, Inghram & Love, The Ronald Press Co., N. Y., Second Revised Edition, 1935, where it is said: "General accounting procedure shows only the cost of goods sold, the cost of goods manufactured, and the cost of raw materials and supplies used in total and not in units * * *. Under the cost procedure, the records are so kept that upon the completion of each unit of product, its cost is ascertained and entered on the records. The cost reports then show such unit costs for use in the solution of administrative problems. The calculation of these unit costs forms one of the basic parts of cost accounting, the procedures being fully explained in subsequent chapters."

[15] Those allegations, as stated in the court's opinion, were as follows:

The difficulties have been stated with elaboration in the amended Bill of Complaint as a basis for the contention that the remedy provided in the statute is inadequate. In substance, they are: When paid by the plaintiffs, the taxes

One would gather from the statement of the difficulties in the amended Bill of Complaint and in the oral argument that the

become a part of the cost to them of the product which they ultimately sell to the customer. In the processing of hogs, the hogs are divided into numerous and separate portions and products, some of which are pickled and some smoked, and others go through other processes. Some are sold as fresh meat. A portion of the carcasses is converted into sausages by using pork trimmings, in the manufacturing of which, meat products are used which are free from the tax imposed by the Act. For this and other reasons, it is impossible to set up a system of accounting which would allocate the proportion or part of the processing tax on the live weight of the hog before the processing. The hogs are sold in the open market in competition with other processors and with meat products which are tax free under the Act. The processing tax is not carried as an item on the invoice and, for this and other reasons, it would be impossible to allocate any particular part of the tax or to do it accurately, and the penalties of Section 20 of the Act might be incurred. There is no provision in the Act allowing the price received by the plaintiffs upon the sale of their products to be allocated first to the reimbursement of the plaintiffs of their costs other than taxes or to be pro-rated to all costs equally. It would be impossible, from an accounting and operating standpoint, to establish in the case of any particular portion or quantity of pork products whether the tax with respect thereto was or was not passed on by the plaintiffs to their customers or to their vendors.

The Bill also states that, as an accounting and operating matter, it is likewise impossible to determine whether the tax was passed to the vendee or passed back to the vendor; that such an attempt would result in speculation and conjecture; that the processing tax is levied upon the live weight of the hog, but that the pork products, derived from the hog, are sold at variable periods varying from four to six or eight months. For these reasons, also, it is alleged, the requirements of Section 21 (d) of the Act could not be met.

difficulties are insuperable. Yet the Bill states:

> That when paid by plaintiffs said taxes become part of the cost to them of the product which they ultimately sell to their customers.
>
> It would seem to us that, with the high development of cost accounting at the present time, it should not be difficult to trace that initial cost. We take judicial notice of the fact that modern systems of accounting have become so accurate that manufacturers are able to trace, in industrial establishments of the most complex character (such as automobile plants), the approximate cost of every process or every part of process which goes into the making of the whole product. Evidence of expert cost-accountants is often received in court. That such a system might be readily applied to the proof in recovery cases is also evidenced by the fact that the Treasury Department in its circular dated January 25, 1935, denominated T. D. 4518, has set up a method of tracing processing taxes to the various products involved in hog processing. This indicates that it is possible to trace the processing tax to the various ultimate products.

We submit it is possible to trace rough rice into its product and to assign to the product its proper portion of all costs, including processing taxes paid by the miller. That this is so is evidenced by the fact that export refunds have been made and allowed under Section 17 of the Act (Part A of the Appendix), in the face of the necessity of proving payment of the tax with respect to the rice ex-

ported, and, further, by the "Marketing Agreements" to which the petitioners were parties.

Export refunds under Section 17 of the Act have been made between April 1, 1935, and October 31, 1935, in the total sum of $1,132,443.25 upon the exportation of rice with respect to which a processing tax was paid. See compilation from the Monthly Reports of the Bureau of Internal Revenue to the Agricultural Adjustment Administration, Part C of the Appendix. Articles 2 and 3 of Chapter II of Treasury Regulations 83 (Part B of the Appendix), relating to exportation under Section 17 of the Act, provide in part that the claim for refund shall be executed by the claimant on the prescribed form (P. T. Form 27); that each claim for refund shall show with respect to each export shipment the quantity of the commodity in each product with respect to which claim is made that the tax was paid, the rate of tax applicable thereto as determined by the conversion factor established in regulations of the Secretary of Agriculture,[16] and the amount of refund claimed thereon; and that each claim shall be supported by proof satisfactory to the Commissioner that the tax, refund of which is claimed, was actually paid to a collector of internal revenue.

[16] These conversion factors are set forth in T. D. 4586, promulgated by the Commissioner of Internal Revenue September 9, 1935 (Internal Revenue Bulletin, Vol. XIV, No. 37, p. 15).

It would seem to be obvious that unless rough rice and the processing tax can be traced into the product, it would be impossible to show with respect to individual export shipments that the tax on the processing of the rough rice contained therein was actually paid. Yet numerous claims for export refunds, made under oath, have been filed and have been allowed and paid. It must be concluded, therefore, that rough rice and the processing tax applicable thereto are capable of being traced into the finished product.

Persuasive evidence that all of the miller's costs can be traced into particular lots of his product and properly allocated thereto is to be found in the first Marketing Agreement for Southern Rice Milling Industry, entered into between the Secretary of Agriculture and the Industry, which Agreement is an official publication of the Department of Agriculture. (See Part D of the Appendix.) All of the petitioners herein were parties to that Agreement.

In the Agreement the millers agreed to pay the producers of rice minimum prices fixed by the Secretary of Agriculture. Article IV. They also agreed to sell the out-turn from a barrel of rough rice at minimum prices determined by adding to the cost of the rough rice, the cost of conversion, the actual cost of the container, and the Marketing Fund charge provided in the agreement. The cost of conversion was determined to be $.70 per barrel

of rough rice until it should be changed by the Control Committee, with the approval of the Secretary of Agriculture.[17] Article V. The millers were to elect a Control Committee of seven members who had the power and duty to supervise performance of the agreement. Article II. Finally each miller agreed to maintain a system or systems of accounting which should accurately reflect a true account and condition of its business. Each miller's books and records were subject to examination by the Secretary to assist him in carrying out his duties under the Agreement, including the verification of information supplied him, as well as the examination by the Control Committee in checking alleged violations of the Agreement. Article VIII. The Secretary duly fixed the minimum price of rough rice.

In determining whether a particular miller had actually complied with the Agreement, it was essential to be able to trace the clean milled rice sold back to the rough rice from which produced, that is, to check such sales against the purchases of rough rice, in order to ascertain whether the minimum purchase price had been paid and whether the minimum sales price had been obtained. The fact that the millers agreed to keep proper records to reflect these facts must lead to the conclusion that they

[17] While subsequent to the First Marketing Agreement a fixed minimum sale price was substituted for the formula contained in Article V, on July 21, 1934, following a public hearing, a substantially similar formula was adopted for determining the minimum sale price.

themselves believed that their books could be kept in such manner as to trace rough rice into clean milled rice and the clean milled rice sold back to rough rice for the purpose of determining whether the prices contemplated by the Agreement had been paid and obtained.[18]

It is reasonable to suppose that the Marketing Agreement reflects the practice of the industry and the ability of the members thereof to trace clean rice back to the particular rough rice processed; otherwise, they would not have entered voluntarily into the Agreement. The fact that the Agreement was prepared by the industry and was voluntarily submitted by the members thereof to the Secretary

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[18] That cost may be traced in the rice milling business is evidenced by testimony taken at the public hearing held at Beaumont, Texas, on August 31, 1934, relative to a reduction in the amount of the conversion charge and a proposed amendment to the amended Agreement for the Southern Rice Milling Industry pursuant to Section 8, subsection (2) of the Act. The official report of those proceedings is open to public inspection and is in the office of the Hearing Clerk of the Agricultural Adjustment Administration, Docket No. 237. In that proceeding Mr. Frank A. Godchaux, Sr., representing the Louisiana State Rice Milling Company, in discussing the proposed change in the conversion charge, stated (Tr. 72):

* * * so far as conversion is concerned they make statements here, but they do not prove them with actual figures of the mills. I can give you in the record just exactly what it costs in every department of the business, in detail, what it costs to buy rough rice, sell clean rice, and everything else, and that is the reason I thought if they would put some figures in here by the Government we could set our figures against them and stop a lot of argument.

of Agriculture for his consideration and approval, supports this conclusion.

If, as we contend, costs and the tax can be properly determined with respect to the product, then the question whether the burden of the tax was shifted within the meaning of Section 21 (d) becomes a matter of legal theory, which can properly be determined by the courts, and which involves no element of impossibility of proof.

We think it is not incumbent upon the Government, a defendant, to show these petitioners in advance of suit for refund, the manner in which they can establish their claims. The theory of proof must be developed by the courts in individual cases. It may be that the courts will hold that the tax is passed on when the selling price of the product equals its cost, plus the tax. Or the theory may be adopted that an absence of an increase in selling price of the product and an absence of a decrease in purchase price of the rough rice after the Act took effect, other costs being constant, is persuasive proof that the tax was not shifted. Or a comparison with a fair profit of pre-tax periods may possibly furnish the test.[19] But whatever test

[19] The District Court for the Southern District of Mississippi in *Meridian Grain and Elevator Co.* v. *Fly*, 12 Fed. Supp. 64, was of the opinion that the last named theory was the test. There the court said (p. 66):

To the cost of its investment, the raw material, wages, and other expenses of manufacture, it only needs to add a fair profit to arrive at a selling price, unless it desires to pass on

should be adopted, we submit that it is perfectly possible to develop a fair and reasonable theory, given a true picture of the miller's operations, his books of account and records, if properly kept, and possibly statistical studies of the trade. Cost being established, we submit that it can as well be determined whether the tax was shifted indirectly as in the case of the sales tax considered in *United States* v. *Jefferson Electric Co., supra.*

It should be noted that the three cases considered by this Court in the *Jefferson Electric Co.* case, and remanded to the respective trial courts, have all been tried again and decided. The Court of Claims found on the evidence that the taxes in the *Jefferson Electric Co.* case had been passed on to the purchaser (10 Fed. Supp. 950); the District Court of Connecticut found that the full burden of the tax had been borne by the taxpayer in the case of *American Chain Co.* v. *Hartford-Connecticut Trust Co.,* 11 Fed. Supp. 770; and the District Court for the Northern District of Ohio found in the case of the *Willard Storage Battery Co.* v. *Routzahn,* decided October 3, 1935 (not yet reported), that the taxpayer had borne the tax on some of the sales while on others the burden had

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the tax, in which event it will also add the amount thereof. If competition forces a reduction in the price to the extent of excluding the tax therefrom, this fact is easily susceptible of proof by the processor.

been shifted. Clearly, if the taxes there involved were taxes generally passed on to the purchaser, yet those particular taxpayers were able to show they had themselves borne the burden, it should not be impossible for processors to show that they had borne the burden of all or a part of the processing tax if they had actually done so.

The allegations contained in the petition, we submit, do not demonstrate the inadequacy of the remedy but merely emphasize difficulties of proof. Mere complication of facts alone and difficulty of proof are not a basis of equity jurisdiction. *Curriden* v. *Middleton,* 232 U. S. 633, 636; *United States* v. *Bitter Root Co.,* 200 U. S. 451. The mere fact that evidence is voluminous or tedious is not sufficient to permit the removal of an action from a court of law to a court of equity. *Bowen* v. *Chase,* 94 U. S. 812, 824. If it be conceded that proof of the necessary facts in individual cases is difficult, nevertheless, we submit that it is perfectly possible to keep such records and accounts in the rice milling business as will afford a sufficient basis for a determination whether the burden of the tax was borne by the processor. "The law, which is said not to require impossibilities, must be satisfied, in many of its applications, with fair and reasonable approximations." *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165, 191. The remedy, therefore, is adequate to secure the amount to which the processor is justly entitled. The elements of proof necessary

to establish a processor's case in a suit for refund under Section 21(d) are certainly no more onerous and burdensome than the elements of proof imposed upon the citizen in *Perry* v. *United States,* 294 U. S. 330. In that case it was held that the plaintiff must prove actual damage by the devaluation of the dollar. Nor are the elements of proof under Section 21 (d) more difficult and intricate than the burden of proof upheld in *Reinecke* v. *Spalding,* 280 U. S. 227, in connection with fixing the rate of depletion. See 30 F. (2d) 369, 370.

In any event, we submit that this is not the proper proceeding in which to determine whether or not Section 21 (d) denies an adequate remedy. The statute gives a remedy for the recovery of taxes to which the processor is justly and equitably entitled. Whether its requirements are susceptible of proof is best determined in the suit for refund where all of the factors bearing upon the question may be developed. It is not lightly to be assumed that the Commissioner or the courts will so construe the remedy as to deny the taxpayer the relief provided. Rather, the assumption may be made that the section will be administered fairly to allow a refund where it appears to be warranted. *But in any event, until a real attempt is made to show the facts contemplated by the statute, a decision by this Court based solely upon abstract considerations that the test can never be met and that no*

remedy is afforded, it is submitted, would be premature and unwarranted.

The situation is not similar to that in *Ohio Oil Co.* v. *Conway,* 279 U. S. 813, cited by the petitioners (Br. 28). There it appeared that if the State tax should be unconstitutional, the injury to the taxpayer would be certain and irreparable, since the local law afforded no remedy whereby restitution might be made. Here the remedy is given by the statute and its efficacy can be tested by suit at law.

3. Section 21 (d) does not deny the processor due process of law by denying him a trial de novo

Apart from the question whether the statute places upon them an impossible burden of proof, which has been discussed, the petitioners argue that the remedy is inadequate and they are deprived of due process because there is not a trial *de novo* in the District Court, but a decision based on the record made before the Commissioner of Internal Revenue, and that they are deprived of the right to trial by jury.

The Agricultural Adjustment Act, as amended, does not in terms provide that there shall be no trial by jury to recover processing taxes.

Section 19 (b) of the Act, as amended, makes available to the processor all the remedies available to those paying excise taxes under Section 600 of the Revenue Act of 1926, *infra,* and Section 626 of the Revenue Act of 1932, *infra,* which include

Sections 3220 and 3226 of the Revised Statutes, *infra,* and related provisions. It should be noted also that under Section 21 (g) of the Agricultural Adjustment Act, as amended, Section 3226 of the Revised Statutes is specifically made applicable, and by Section 21 (d) (3) the District Courts are expressly given jurisdiction.

There is, of course, no right to trial by jury in suits against the United States, *McElrath* v. *United States,* 102 U. S. 426, 440; *Luckenback S. S. Co.* v. *United States,* 272 U. S. 533. The right of trial by jury in proceedings against the Collector arises by implication from Section 566 of the Revised Statutes (U. S. C., Title 26, Sec. 770), and Section 3226 of the Revised Statutes. See *Wickwire* v. *Reinecke,* 275 U. S. 101.

Hence, the Agricultural Adjustment Act does not prohibit trial by jury, but it does to some extent remove all necessity for a jury trial by limiting the issues before the District Courts.

Under Section 21 (d) it is provided that no refund or credit shall be allowed unless after a claim is duly filed, "it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record" after hearing, that the processor has not passed the tax on to the consumer or back to the producer. It further provides that in any judicial proceeding relating to such claim, a transcript of

the hearing before the Commissioner shall be duly certified and filed as the record in the case, and shall be so considered by the court. We believe that this provision clearly makes the Commissioner's determination of the fact whether the tax has been passed on to the consumer or back to the producer, conclusive if supported by substantial evidence and not plainly arbitrary.[20]

Whether the statute be construed as doing away with a jury trial on all issues of fact, or merely removing from the jury the one issue of fact as to whether the burden of the tax has been passed on to the consumer, the same procedure has been tried and not found wanting in due process in the collection of customs duties.

Under present procedure the importer who is dissatisfied with the valuation placed on his imports by the collector of customs may appeal to the Customs Court on the record made before the collector. The Customs Court is merely an administrative body performing the same functions as the Board of General Appraisers, whose duties it took over. Act of May 28, 1926, c. 411, 44 Stat. 669 (U. S. C., Title 28, Secs. 301–311). *Ex parte Bakelite Corp'n*, 279 U. S. 438. If still dissatisfied, the importer may then appeal to the Court of Customs Appeals, but

[20] There is some reason to assume from the Committee Reports that Congress intended there should be no trial *de novo* on any issues of fact. See H. Rep. No. 1757, 74th Cong., 1st Sess., pp. 31–35.

his review there is not a trial *de novo* (Judicial Code, Secs. 195, 196, U. S. C., Title 28, Secs. 308–309).

This remedy is exclusive (*United States* v. *Stone & Downer Co.*, 274 U. S. 225; *Riccomini* v. *United States*, 69 F. (2d) 479 (C. C. A. 9th)), but it has been held to afford an adequate remedy and constitute due process. *Ex parte Bakelite Corp'n*, 279 U. S. 438. See also *Vitelli & Son* v. *United States*, 250 U. S. 355; *United States* v. *Aetna Explosives Co.*, 256 U. S. 402; *United States* v. *Rice & Co.*, 257 U. S. 536; *United States* v. *Stone & Downer Co.*, *supra.*

In *Ex parte Bakelite Corp'n, supra,* the Court said (pp. 451–452, 458):

> Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.
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> *The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying*

> *that power into execution. The full province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called the Board of General Appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers.* True, the provisions of the customs laws requiring duties to be paid and turned into the Treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid, but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings. (Italics supplied.)

The procedure under the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131, 138, was similar except that then the appeal was from the decision of the collector, to the Board of General Appraisers and thence to the Circuit Courts. But there was no jury trial in the Circuit Courts,

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because the Act of 1890 repealed the right to sue the collector and obtain a jury trial which had existed under Section 3011 of the Revised Statutes.[21] Since the enactment of that Act, neither a statutory nor a common law action against the Collector can be brought for the recovery of customs duties. *Schoenfeld* v. *Hendricks,* 152 U. S. 691; *United States* v. *Passavant,* 169 U. S. 19; *Arnson* v. *Murphy,* 109 U. S. 238. Moreover, that Act made the determination of the Board of General Appraisers on questions of value ~~and classification~~ conclusive, if supported by evidence, so that the Circuit Courts had nothing substantial to review except question of law. *United States* v. *Passavant,* 169 U. S. 19; *In re Kursheedt Manuf'g Co.,* 49 Fed. 633 (C. C. S. D. N. Y.), affirmed, 54 Fed. 159 (C. C. A. 2d); *In re White,* 53 Fed. 787 (S. D. N. Y.); *Vandiver* v. *United States,* 156 Fed. 961 (C. C. A. 3d). See also *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 316. While under that Act the Circuit Courts had authority to direct taking of further evidence (*In re Fasset,* 142 U. S. 479, 486; *In re F. W. Myers,* 123 Fed. 952 (N. D. N. Y.)), they generally declined to permit the introduction of evidence on points on which no evidence was introduced before

[21] There may be an action against the Collector of Customs for money had and received, where, regardless of protests, he has taxed something which was not an import at all. *DeLima* v. *Bidwell,* 182 U. S. 1.

the Board. *United States* v. *China & Japan Trading Co.*, 71 Fed. 864 (C. C. A. 2d); *William F. Allen & Co.* v. *United States*, 127 Fed. 777 (C. C. A. 2d); *J. S. Plummer & Co.* v. *United States*, 166 Fed. 730 (C. C. A. 2d), affirming 160 Fed. 284 (S. D. N. Y.). The remedy provided by that statute was exclusive. *United States* v. *Lies*, 170 U. S. 628.

Even prior to 1890, when there was a right of action against the Collector in customs cases, the valuation of the merchandise was removed from the jury by the appraiser's finding being made conclusive. *Origet* v. *Hedden*, 155 U. S. 228; *Auffmordt* v. *Hedden*, 137 U. S. 310; *Earnshaw* v. *United States*, 146 U. S. 60; *Erhardt* v. *Schroeder*, 155 U. S. 124; *Passavant* v. *United States*, 148 U. S. 214. Yet that procedure was held to afford an adequate remedy and to constitute due process. In *Auffmordt* v. *Hedden, supra*, the Court said (p. 324):

> "* * * In these respects the United States have, as was said by this court in *Nichols* v. *United States*, 7 Wall. 122, enacted a system of corrective justice, as well as a system of taxation, in both its customs- and internal-revenue branches. That system is intended to be complete. In the customs department it permits appeals from appraisers to other appraisers, and in proper cases to the Secretary of the Treasury; and, if dissatisfied with this highest decision of the executive department of the government, the law permits the party, on paying the money re-

quired, with a protest embodying the grounds of his objection to the tax, to sue the government through its collector, and test in the courts the validity of the tax." It was said also in that case (p. 89) that the government "*has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues.*" One of those conditions is and always has been, that the determination of appraisers as to the dutiable value of goods shall be conclusive and not reexaminable in a suit at law, provided that appraisers are selected in conformity with the statute, and, in appraising, act within the scope of the powers conferred upon them. See, also, *State Railroad Tax Cases,* 92 U. S. 575, 613; *Snyder* v. *Marks,* 109 U. S. 189, 193, 194; *Hilton* v. *Merritt,* 110 U. S. 97; *Arnson* v. *Murphy,* 115 U. S. 579, 585, 586; *Oelbermann* v. *Merritt,* 123 U. S. 356, 361. (Italics supplied.)

See also, *Cheatham* v. *United States,* 92 U. S. 85, 88–89.

Nor is there any reason to conclude that a processor who is taxed is given different or greater constitutional guarantees than an importer who pays duties. The brief of *amici curiae* suggests that in imposing duties, Congress is relying upon its power to control foreign commerce as well as upon its taxing power and, hence, that decisions relating to the collection of duties are not controlling, citing *Board of Trustees* v. *United States,* 289 U. S. 48. We submit that that case does not stand for the

principle that different methods of procedure must be followed as to the *recovery* of duties and excise taxes. While the power of Congress to control foreign commerce may be the power relied upon in admitting or excluding articles from this country (*Buttfield* v. *Stranahan*, 192 U. S. 470), that power does not determine what constitutes due process in the recovery of duties or taxes paid. It is obvious that in matters of procedure what constitutes due process in permitting actions to recover duties should constitute due process in actions to recover internal revenue and other taxes, all of which are limited by Article I, Section 8, Clause 1, of the Constitution, and we know of no case holding otherwise. Indeed this Court has often considered tariff cases in the light of the Fifth Amendment. See *Cary* v. *Curtis*, 3 How. 235, and *Auffmordt* v. *Hedden, supra*. The same plenary power exists as to taxation that exists as to foreign commerce.

It follows, therefore, that all right of action by the processor against the collector might be withdrawn as the right of the importer to sue the collector has been, leaving the processor only his remedy against the United States and hence, depriving him of a jury trial.

A new remedy may be adopted for the collection of taxes. *League* v. *Texas*, 184 U. S. 156. Inasmuch as Congress can prescribe the conditions under which it will allow suits to recover the processing taxes (*Cheatham* v. *United States, supra*), it obviously can take away the right of trial by

jury without violating the due-process clause. The matter is merely procedural and procedural matters may be altered. *Funkhouser* v. *Preston Co.*, 290 U. S. 163; *Red River Valley Bank* v. *Craig*, 181 U. S. 548, 553; *Tennessee* v. *Sneed*, 96 U. S. 69, 73–74, and cases cited. *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 570; *In re Villano*, 102 N. J. Eq. 187, 188; *League* v. *Texas*, *supra*; *Ettor* v. *Tacoma*, 228 U. S. 148, 155.

In *Wickwire* v. *Reinecke*, *supra*, this Court expressly stated that the right to a trial by jury in suits against the Collector of Internal Revenue might be withdrawn.

In that case this Court said (pp. 105–106):

> It was suggested, in the brief for the United States in resisting the application for certiorari, that the assignment of error made on behalf of the petitioner was inadequate in that it was not based on a reference to the Seventh Amendment to the Constitution requiring a jury trial in a civil case involving more than twenty dollars. This objection has not been renewed in the brief on the merits, doubtless because the right of the petitioner to a jury in such a case is not to be found in the Seventh Amendment to the Constitution but merely arises by implication from the provisions of § 3226, Revised Statutes, which has reference to a suit at law. It is within the undoubted power of Congress to provide any reasonable system for the collection of taxes and the recovery of them when illegal without a jury trial—

> if only the injunction against the taking of property without due process of law in the method of collection and protection of the taxpayer is satisfied. *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 281, 282, 284; *Nichols* v. *United States*, 7 Wall. 122, 127; *Cheatham* v. *United States*, 92 U. S. 85, 88, 89.

We think that in so holding this Court recognized that a suit against the collector is no longer a suit at common law but a statutory proceeding, and hence that no jury trial is required by the Seventh Amendment.

Prior to 1839 collectors were not required to pay into the Treasury taxes collected but might retain them pending the outcome of controversies concerning liability. Under that state of the law it was held in *Elliott* v. *Swartwout*, 10 Pet. 137, that a common-law action in assumpsit would lie against the collector to recover an excess of duties paid to the collector with notice of the intention of the payor to sue to recover it. The Court said (p. 158):

> From this view of the cases, it may be assumed as the settled doctrine of the law, that where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility, by paying it over to his principal, if he has had notice not to pay it over. The answer, therefore, to the third point must be, that the collector is personally liable to an action to recover back an excess of duties paid to him as collector,

under the circumstances stated in the point; although he may have paid over the money into the treasury.

On March 3, 1839, a statute was passed, c. 82, 5 Stat. 339, 348 (See also Sec. 3210, Revised Statutes, U. S. C., Title 26, Sec. 1761), which made it obligatory for the collector to pay all moneys received into the Treasury. After the enactment of this statute it was held in *Cary* v. *Curtis*, 3 How. 235, that the collector was no longer such an agent as would make him liable within the ordinary rules of agency, that an action of assumpsit for money had and received would no longer lie against the collector, and that the statute so construed was not unconstitutional. Cf. *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1.

Shortly after the decision in *Cary* v. *Curtis, supra,* was handed down Congress passed the Act of February 26, 1845, c. 22, 5 Stat. 727, which provided that nothing in Section 2 of the Act of 1839 should be construed to deny or impair the right of any persons "who have paid or shall hereafter pay" duties under protest "to maintain any action at law against such collector * * * and to have a right to a trial by jury" to determine the legality and validity of such payment, but such action could be maintained and recovery could be had only if protest was made in writing at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof.

Later statutes likewise provided that where a recovery should be had and the court should certify that there was probable cause for the act done by the collector or that he acted under the direction of the Secretary of the Treasury or other proper officer, no execution should issue against him and the amount so recovered, should, upon final judgment, be provided for and paid out of the Treasury. C. 76, 12 Stat. 737, 741, Section 989, R. S.; *City of Philadelphia* v. *Collector,* 5 Wall. 720, 731; *Curtis's Administratrix* v. *Fiedler,* 2 Black 461; *Collector* v. *Hubbard,* 12 Wall. 1; *Arnson* v. *Murphy,* 109 U. S. 238.

In *Arnson* v. *Murphy, supra; Auffmordt* v. *Hedden, supra,* and *Schoenfeld* v. *Hendricks,* 152 U. S. 691, it was held directly that the suit against the collector thereafter was purely statutory and that it was substituted for every common-law right.

In *Curtis's Administratrix* v. *Fiedler, supra,* the duties had been paid under protest and remitted to the Treasury in 1842 and suit was brought after the passage of the Act of February 26, 1845. The Court cited *Cary* v. *Curtis, supra,* with approval, but held that in view of the Act of February 26, 1845, suit could have been maintained against the collector if the protest filed had been sufficient, but that it was not. See also *Barney, Collector* v. *Watson,* 92 U. S. 449.

Again in *Nichols* v. *United States,* 7 Wall. 122, the Court, after pointing out that the Act of 1845 altered the rule previously in force, said (p. 127):

> The allowing a suit at all, was an act of beneficence on the part of the government. As it had confided to the Secretary of the Treasury the power of deciding in the first instance on the amount of duties demandable on any specific importation, so it could have made him the final arbiter in all disputes concerning the same.

We think that these decisions establish that the remedy against the collector is now a statutory remedy. It is a wholly anomalous proceeding in any event since the collector is required to pay over his collections and since protest is no longer a condition precedent to recovery. See Section 3226 of the Revised Statutes; *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373. We do not think that decisions holding that the remedy against the collector is personal mean necessarily that it is a common-law remedy but on that subject. Compare *Smietanka* v. *Indiana Steel Co., supra,* and *Graham & Foster* v. *Goodcell,* 282 U. S. 409, with *Moore Ice Cream Co.* v. *Rose, supra.*

Inasmuch as it is a statutory remedy, the right to a trial by jury is not required and may be denied by Congress, as this Court held in *Wickwire* v. *Reinecke, supra.*

Thus the right of action against a collector of customs may be taken away and the judicial proceedings in customs cases may be limited to questions of law arising on a record as previously made before an administrative body; it follows that in a

proceeding against the Collector of Internal Revenue given by statute, the jurisdiction of the District Court may be limited to a review of errors of law arising on the record made before the Commissioner or its review on the one issue of the passing on of the tax may be so limited, if the Court so construes the statute.

Congress, of course, has power to take away jurisdiction of the District Courts. *Cary v. Curtis*, 3 How. 235; *Kline v. Burke Constr. Co.*, 260 U. S. 226, 234. Moreover, as has already been pointed out, since the matter is merely procedural, Congress could make changes in procedure governing suits to recover taxes without violating the due process clause.

Under the statute here involved, the petitioners are entitled to notice and hearing before the Commissioner of Internal Revenue and may offer all of the evidence that they might offer to a court to enable it to determine whether they are entitled to recovery.

But the statute does not stop short with the administrative review. It provides that the processor may bring suit to recover in the District Court and that the entire record of the proceedings before the Commissioner, not just the Commissioner's findings, shall be the basis of proceedings before the Court. This makes it possible for the Court to determine all questions of law, including the question whether the Commissioner's determination is supported by evidence.

The procedure in this case likewise resembles that in the case of appeals from the Board of Tax Appeals to the Circuit Court of Appeals in income and estate tax cases, except that the Board of Tax Appeals record may or may not contain the evidence in addition to the Board's findings. The Circuit Courts of Appeals have no jurisdiction to redetermine issues of facts but are limited to a determination of questions of law, among which are included the question whether the findings of the Board are supported by substantial evidence. This procedure has been sustained as constituting due process of law. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *Phillips* v. *Commissioner, supra.*

The petitioners seek to distinguish those cases on the ground that there the taxpayer had the option of paying the tax and then bringing suit to recover. But we think the language of the court in *Phillips* v. *Commissioner, supra,* indicates that the first procedure alone would have been sufficient. The Court said, p. 600:

> Nor is the second objection of weight. It has long been settled that determinations of fact for ordinary administrative purposes are not subject to review. *Johnson* v. *Drew,* 171 U. S. 93, 99; *Public Clearing House* v. *Coyne,* 194 U. S. 497, 508; *United States* v. *Ju Toy,* 198 U. S. 253, 263; *Red "C" Oil Co.* v. *North Carolina,* 222 U. S. 380, 394; *Mutual Film Co.* v. *Industrial Commission,* 236 U. S.

230, 246. Compare *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551, 560. Save as there may be an exception for issues presenting claims of constitutional right, such administrative findings on issues of fact are accepted by the court as conclusive if the evidence was legally sufficient to sustain them and there was no irregularity in the proceedings. *Reetz* v. *Michigan,* 188 U. S. 505, 507; *Lieberman* v. *Van De Carr,* 199 U. S. 552, 562; *Douglas* v. *Noble,* 261 U. S. 165, 167; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 443. The adequacy of the scope of review offered by the Revenue Act of 1926 in the case of a deficiency determined directly against the taxpayer was assumed in *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; and this procedure is now thoroughly established. Questions of fact involved in proceedings against transferees are no different or more complex than those often encountered in determining the direct liability of a taxpayer. The alternative judicial review provided is adequate in both cases.

We understand this decision to mean that the judicial review is adequate in cases appealed from the Board, because the taxpayer retains the right to raise all constitutional questions and other questions of law, but that even if it were not, the alternative remedy of proceeding in the District Court was sufficient. We do not understand, as the peti-

tioners seem to contend, that it was only adequate because of the alternative remedy.[22]

Under Section 16 of the Radio Act of 1927, c. 169, 44 Stat. 1162, 1169, as amended by the Act of 1930, c. 788, 46 Stat. 844, it is provided that the Court of Appeals of the District of Columbia may review the orders denying or revoking licenses of the Radio Commission, its review being limited to questions of law only and the findings of the Commission, supported by evidence, being conclusive. Decisions of the Court of Appeals may be reviewed by this Court on writ of certiorari. In *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, it was held that this procedure was adequate, notwithstanding there was no trial *de novo*, and that the decrees of the Court of Appeals were reviewable by this Court.

Tagg Bros. v. *United States*, 280 U. S. 420, 443, arose under the Packers and Stockyards Act, 1921, which gives the Secretary of Agriculture authority to prescribe a maximum charge for services of market agencies in stockyards. (C. 64, 42 Stat. 163–168; U. S. C., Title 7, Secs. 181–217.) The statute provides that an injunction proceeding may be instituted to prevent the enforcement of his order, subject to the same limitations as in actions to enjoin enforcement of orders of the Interstate Commerce Commission. See Act of October 22, 1913, c. 32, 38 Stat. 208, 220; U. S. C., Title 28,

[22] That was the position urged upon this Court by the Government in its brief, page 29.

Sec. 47. The validity of the order is determined upon the record of proceedings before the Secretary, and an appeal may be taken directly to this Court. In sustaining the order of the Secretary in the *Tagg* case, as supported by substantial evidence and not arbitrary, the Court said (pp. 443–444):

> A proceeding under § 316 of the Packers and Stockyards Act is a judicial review, not a trial *de novo*. The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now. *Louisville & Nashville R. R. Co.* v. *United States,* 245 U. S. 463, 466; compare *Liscio* v. *Campbell,* 34 F. (2d) 646, 647; and see *Prendergast* v. *New York Telephone Co.,* 262 U. S. 43, 50, and *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289. On all other issues his findings must be accepted by the court as conclusive, if the evidence before him was legally sufficient to sustain them and there was no irregularity in the proceeding.

See also H. Rep. No. 1665, 71st Cong., 1st Sess., p. 2; *Farmers' Livestock Commission Co.* v. *United States,* 54 F. (2d) 375 (E. D. Ill.).

The determinations of the Interstate Commerce Commission as to whether a rate is reasonable or

unreasonable is conclusive, if supported by substantial evidence in the absence of any irregularity in the proceedings or in applying rules of law. *West Chem. Co.* v. *United States,* 271 U. S. 268; *Virginian Ry.* v. *United States,* 272 U. S. 658; *Atchison Etc. Ry. Co.* v. *United States,* 284 U. S. 248; *Int. Com. Comm.* v. *Louis. & Nash. R. R.,* 227 U. S. 88; *Texas & N. O. R. Co.* v. *United States,* 295 U. S. 395.

Cease and desist orders of the Federal Trade Commission are not reviewable on questions of fact except to determine whether the Commission has been arbitrary (*Fed. Trade Comm.* v. *Curtis Co.,* 260 U. S. 568; *Fed. Trade Comm.* v. *Pac. Paper Assn.,* 273 U. S. 52, 63).

Certain questions of fact are finally determined by officers of the General Land Office without due process of law being violated (*Burfenning* v. *Chicago, St. Paul &c R'y,* 163 U. S. 321; *Johnson* v. *Drew,* 171 U. S. 93), and by the Postmaster General (*Public Clearing House* v. *Coyne,* 194 U. S. 497; *Leach* v. *Carlile,* 258 U. S. 138; *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407. See also *School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94), and by the Director of the Veterans' Administration. *Silberschein* v. *United States,* 266 U. S. 221.

State Workmen's Compensation acts have been sustained which direct that the administrative body shall determine the amount of compensation and limit the question for review to questions of law.

Hawkins v. *Bleakly*, 243 U. S. 210; *New York Central R. R. Co.* v. *White*, 243 U. S. 188; *Dahlstrom Metallic Door Co.* v. *Industrial Board of New York*, 284 U. S. 594, affirming *per curiam*, *Matter of Helfrick* v. *Dahlstrom M. D. Co.*, 256 N. Y. 199. For other State administrative determinations, see *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531; *Rail Coal Co.* v. *Ohio Industrial Comm.*, 236 U. S. 338.

It makes no difference whether these matters of fact are left to the determination of a board or an administrative officer, so long as an adequate hearing is given. See *Tagg Bros.* v. *United States*, *supra*.

The cases of *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U. S. 287, and *Crowell* v. *Benson*, 285 U. S. 22, do not support the principle that determinations of questions of fact by administrative boards or officers may not be made conclusive, if supported by evidence.

In the latter case, with three judges dissenting, the Court held that due process of law was not violated by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, which made the findings of the Deputy Commissioner of the United States Employees' Compensation Commission conclusive on the question as to the circumstances, nature, extent, and consequences of the employees' injuries, but held that its determination that the injury occurred upon the navigable waters of the United States and that an employer-

employee relationship existed, could not be made conclusive, because it was jurisdictional. The Court there pointed out that the existence of the master and servant relationship and the occurrence of the injury on the navigable waters of the United States were indispensable to the power of Congress to enact the legislation as well as to the application of the statute. Because of these peculiar facts, the Court held that the Deputy Commissioner's determination on those issues (but not on other issues of fact) was not conclusive.

The *Ohio Valley Company* case, *supra,* involved the scope of review upon the administrative record in a rate case coming from a state court. This Court did not object to the fact that there was no trial *de novo* of the case in the state court but did hold that the reviewing court must have power to weigh the evidence upon which the State Public Service Commission entered the order fixing the maximum future rates chargeable by the water company in order to determine whether the rate was confiscatory. The decisions in *United Railways* v. *West,* 280 U. S. 234, and *State Comm'n* v. *Wichita Gas. Co.,* 290 U. S. 561, are to the same effect.

We submit that those cases are authority only for the proposition that a statute cannot deny the court's power to reach an independent judgment on the question of value in rate cases where confiscation is claimed. See *Lehigh Valley R. R.* v. *Commissioners,* 278 U. S. 24. It has no reference

to administrative determinations in Federal tax controversies. See *Phillips* v. *Commissioner*, 283 U. S. 589.

It is not inconsistent with the principle of due process to make determinations of fact by administrative boards or officers conclusive if supported by evidence. The term "due process" was borrowed from the English "law of the land" (*Davidson* v. *New Orleans*, 96 U. S. 97), and does not necessarily mean judicial process (*Public Clearing House* v. *Coyne*, 194 U. S. 497; *Reetz* v. *Michigan*, 188 U. S. 505; *Davidson* v. *New Orleans, supra; Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272; *Ex parte Wall*, 107 U. S. 265, 288; *McMillen* v. *Anderson*, 95 U. S. 37), nor does it mean any particular kind of proceeding or procedure. *Insurance Co.* v. *Glidden Co.*, 284 U. S. 151.

The due process clause of the Fifth and Fourteenth Amendments merely requires that the Federal and State Governments shall not deprive one of his property or liberty without such notice and hearing as is commensurate with the necessities of the case, and the character of the rights affected. *Hagar* v. *Reclamation District. No. 108*, 111 U. S. 701; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Hurwitz* v. *North*, 271 U. S. 40; *United States* v. *Ju Toy*, 198 U. S. 253; *Lent* v. *Tillson*, 140 U. S. 316; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Chicago, Burlington &c. R'd* v. *Chicago*, 166 U. S. 226. See also *Title Guaranty Co.* v. *Allen*, 240 U.

S. 136; *Pacific Live Stock Co.* v. *Oregon Water B'd,* 241 U. S. 440.

It is particularly true that in the field of Federal taxation, due process may not mean judicial process. In *Murray's Lessee* v. *Hoboken Land and Improvement Co., supra,* it was held to be due process of law for Congress to provide summary means to compel revenue officers, or in case of default, their sureties, to pay over such balances of the public moneys as might be in their hands. The Court there said (p. 280):

> For, though "due process of law" generally implies and includes *actor, reus, judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, * * * yet, this is not universally true.

In that connection, it should be noted that the Fifth Amendment is not a general limitation on the taxing powers of the Federal Government. *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1. It has sometimes been invoked to prevent the Federal Government from reaching certain subjects in estate and income taxation; as, for example, transfers fully consummated before death. *Heiner* v. *Donnan,* 285 U. S. 312; *Nichols* v. *Coolidge,* 274 U. S. 531. Similarly, it is held that a State cannot tax one person on another's income. *Hoeper* v. *Tax Commission,* 284 U. S. 206. These decisions do not deal with matters of procedure but subjects of taxation, and they rest upon the ground that a tax may not be

so arbitrary and capricious as to amount to confiscation under the Fifth and Fourteenth Amendments. They are the type of cases to which the Court referred to in the footnote in *Louisville Bank* v. *Radford,* 295 U. S. 555, 589, which the brief of *amici curiae* has mentioned (p. 11).

There are intimations in the cases of *Londoner* v. *Denver,* 210 U. S. 373, and *Hagar* v. *Reclamation District No. 108, supra,* that there are forms of taxes, for example, poll taxes, which may be imposed without even an administrative hearing where the determination of the tax is not left to administrative officers. But for the purposes of this case, we may accept the general rule that there must be either an administrative [23] or a judicial hearing at some stage of the proceedings. *Pittsburgh &c. R'y Co.* v. *Board of Pub. Works,* 172 U. S. 32; *Davidson* v. *New Orleans, supra; State Railroad Tax Cases,* 92 U. S. 575; *Kelley* v. *Pittsburgh,* 104 U. S. 78.

In reference to property taxes, for example, an administrative hearing on the valuation before the collection of the tax will constitute due process. *Pittsburgh, &c., Railway Co.* v. *Backus,* 154 U. S. 421; *McMillen* v. *Anderson, supra; Michigan Central Railroad* v. *Powers,* 201 U. S. 245, 301, 302; *Glidden* v. *Harrington,* 189 U. S. 255; *Hagar* v.

[23] If only an administrative hearing is granted it must give the individual due notice and a fair chance to present his case. *Londoner* v. *Denver, supra.* See also *Japanese Immigrant Case,* 189 U. S. 86; *United States* v. *Ju Toy, supra; Buttfield* v. *Stranahan, supra.*

Reclamation District No. 108, supra; Pittsburgh, &c., R'y Co. v. *Board of Pub. Works, supra.* And even where some kind of a judicial review may be had, in such cases, the valuation of the assessors or Board of Equalization may be conclusive unless it violates some law. See *Kentucky Railroad Tax Cases,* 115 U. S. 321. See also *Ex parte Bakelite Corp'n, supra.*

We think it is clearly settled, that when a judicial hearing is granted after an administrative hearing, the judicial hearing may be limited to questions of law without violating the due process clause.

It is our position that the procedure before the District Court grants an adequate judicial hearing, notwithstanding the limitation of issues before the court and the denial of a trial *de novo* and that it likewise constitutes due process of law.

4. *Even if Section 21 (d) is invalid on the ground that it denies due process, nevertheless, petitioners have an adequate remedy at law*

We have shown that Section 21 (d) does not deprive petitioners of due process, either because of impossibility of proof or because of the denial of a *de novo* trial in the District Court. If the petitioners should be relegated to suits for refund, which we contend are the only proper proceedings under the circumstances, they will be deprived of no constitutional rights even though their complaints against Section 21 (d) are justified. Should

it be considered that due process is denied on either of these grounds the section, we assume, would be invalid and have no effect. If the section is invalid for either reason petitioners would then be relegated to their rights under the general statutes providing for tax refunds, reenacted in Section 19 (b) of the Act, free from the limitation imposed by Section 21 (d). This is the only logical construction in the light of Section 21 (g) of the Act, which extends Section 3226 of the Revised Statutes to apply to any suit for the recovery of processing taxes. Furthermore, the statute contains a separability clause (Section 14) which permits such a result to be accomplished.

Throughout their brief the petitioners have contended that Section 21 (a) or the proceedings for summary collection are unconstitutional *because of* the arbitrary limitations of Section 21 (d). They have studiously avoided suggesting that Section 21 (d) is unconstitutional. But clearly, if they are deprived of due process it must follow from their very complaint that Section 21 (d) accomplishes that result, and not Section 21 (a), nor proceedings for summary collection.

The situation, we think, reduces itself to this: If, as we contend, Section 21 (d) does not deny an adequate remedy at law, injunction will not lie; if, on the contrary, its effect is to deprive the taxpayer of any remedy, it could be held invalid in the suit for refund and the petitioners would then be rele-

gated to the unquestionably adequate remedy provided by Section 21 (g) and Section 3226 of the Revised Statutes and related provisions. In either event the petitioners have no basis upon which to predicate the contention that Section 21 (a) and Section 3224 of the Revised Statutes are inapplicable.

II

The Agricultural Adjustment Act, as Amended, Is Constitutional

We have shown that petitioners should not be permitted to enjoin the collection of the processing taxes here involved, whether or not the Act levying the tax be constitutional. *Bailey* v. *George,* 259 U. S. 16; *Dodge* v. *Osborn,* 240 U. S. 118. Therefore a consideration of the constitutionality of those provisions of the Act imposing the tax would seem to be unnecessary. However, if this Court shall consider the constitutional provisions (Cf. *Dodge* v. *Brady,* 240 U. S. 122; *Florida* v. *Mellon,* 273 U. S. 12), we submit that such provisions are constitutional.

The grounds upon which the Agricultural Adjustment Act, as amended, is asserted to be unconstitutional are that (1) though in form a revenue measure, it is in fact an attempt to regulate prices; (2) it violates the Tenth Amendment; (3) the taxes are not levied for the general welfare or for a public purpose; and (4) the Act, as amended, contains an unconstitutional delegation of legisla-

tive power to the Secretary of Agriculture. The objections thus raised are substantially the same as the constitutional issues raised in *United States* v. *William M. Butler et al.*, No. 401, Present Term.[24]

In the Government's brief in that case it is pointed out that the processing tax on cotton under the original Agricultural Adjustment Act is a valid excise (pp. 29–32); that it meets the constitutional requirements of uniformity (pp. 44–47); and that such taxes do not contravene the Fifth Amendment (pp. 116–122). It is also pointed out that the taxing provisions relate solely to the raising of revenue and that argument against the Act is based, not primarily on the method of taxation but on the use to be made of the proceeds raised thereby (pp. 24–29). On this ground the brief distinguishes the *Child Labor Tax Case*, 259 U. S. 20, and *Hill* v. *Wallace*, 259 U. S. 44 (p. 29). However, these cases have been construed by counsel on behalf of the taxpayer in the *Butler* case as holding that a tax is bad if some purpose other than the raising of revenue appears on the face of the act, and attempt has thereby been made to apply these cases to the Agricultural Adjustment Act on

[24] It is to be noted that these cases do not involve the floor stocks taxes, the validity of which is present in the *Butler* case. See Section 10 of the Act of March 18, 1935, now appearing as Section 16 (f) of the Act. Aside from this, the constitutional questions are substantially the same in both cases.

the ground that a purpose of regulation of agriculture appears on the face of that Act. This argument misconceives the true basis of the *Child Labor Tax Case* and *Hill* v. *Wallace*. They did not hold, contrary to *McCray* v. *United States*, 195 U. S. 27; *United States* v. *Doremus*, 249 U. S. 86; and *Hampton & Co.* v. *United States*, 276 U. S. 394, that acts prescribing methods having a reasonable relation to the exercise of the power of taxation were invalid because of an expressed purpose. They held that the *methods* set forth in the Acts under consideration had no reasonable relation to the exercise of the power of taxation and, therefore, that the Acts were bad. The question is *what* is done by the Act, not *why* it is done. No methods are contained in the pertinent provisions of the Agricultural Adjustment Act which do not have a reasonable relation to the exercise of the power of taxation given by the Constitution. The Act is, therefore, a proper exercise of that power and is not to be invalidated because enacted with some other purpose in view. *McCray* v. *United States, supra; United States* v. *Doremus, supra; Hampton & Co.* v. *United States, supra.*

Moreover, the only purpose other than the raising of revenue which may be found in the Act is the purpose which, it was hoped, would be accomplished by the expenditures to be made under the appropriation contained in the Act rather than by the levy of the taxes, and if that purpose may be

inquired into, it will be found to be a proper purpose of Federal expenditure of tax money. It is urged in our brief in the *Butler* case, that taxpayers should not be allowed to question the appropriation as a defense to the payment of their taxes (pp. 122–135). If the taxpayers are to be allowed to raise that question, however, the brief points out that the appropriation and acts taken by the administrative officers thereunder are a proper exercise of the spending power implied from the power to tax (see pp. 136, 90–101), for the reasons that the power of Congress to tax for the general welfare is not restricted by the other enumerated powers (pp. 135–172), that the purpose of the expenditures made under the appropriation has a reasonable relation to the promotion of the general welfare (pp. 172–227), that this purpose of promotion of the general welfare is a public purpose (pp. 227–241), and that the Act does not violate the Tenth Amendment (pp. 262–279). Also, aside from the taxing power, the brief demonstrates that the Agricultural Adjustment Act may be sustained as a valid exercise of the fiscal powers of Congress (pp. 241–262).

With regard to the argument beginning on page 98 of the brief of Malcolm Donald, Esq., as *amicus curiae* in the *Butler* case that the Hamiltonian view of the general welfare clause, for which we contend, is contrary to the practice under the Articles of Confederation, we refer the Court to Section 916 of Story, Constitution of the United States, Vol. I,

5th Ed., where this argument is analyzed and refuted. With regard to the argument on pages 177, 178, 194, and 195 of Mr. Donald's brief, based on *Frost Trucking Co.* v. *R. R. Com.*, 271 U. S. 583; and *Union Pac. R. R.* v. *Pub. Service Comm.*, 248 U. S. 67,[25] to the effect that the expenditure of money under the Agricultural Adjustment Act could not be conditioned on the reduction of production by farmers, we refer the Court to *Helvering* v. *Ind. Life Ins. Co.*, 292 U. S. 371. The distinction to be arrived at from the comparison of these cases is that while the legislature may not impose a condition beyond its power on the exercise of a Constitutional right, the legislature may impose any condition that it sees fit when it is extending a benefit to which the recipient has no Constitutional right. The rental and benefit payments under the Agricultural Adjustment Act are of the latter type.

The arguments advanced in the Government's brief in the *Butler* case, on the constitutionality of the Act, are applicable here. The taxes here involved are rice processing taxes for the month of September, 1935, and ensuing months. Section 9 (b) (3) of the Act, being Section 3 of the Act of March 18, 1935, adopted by Section 12 of the Act of August 24, 1935, imposes a tax at the rate of one cent per pound of rough rice on the processing thereof. Section 9 (d) (7), as added by Section 6 of the Act of March 18, 1935, defines the

[25] *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Coyle* v. *Smith*, 221 U. S. 559, are to the same effect.

term "processing", as used in the Act, in reference to rice, to mean the cleaning, shelling, milling, grinding, rolling, or other processing of rough rice. Section 12 of the Act, as amended by Section 3 of the Act of August 24, 1935, appropriates an amount equal to the proceeds derived from all such taxes for the purpose of making rental and benefit payments and for other purposes discussed in the Government's brief in the *Butler* case (pp. 132–134). It is clear from the arguments there made that the tax here is a valid excise.

In addition to the arguments there made, certain other arguments are here necessary by reason of the amendments to the Agricultural Adjustment Act of March 8, and August 24, 1935, which contain specific provisions relating to rice. These arguments relate chiefly to the question of whether legislative power has been conferred on the Secretary of Agriculture. It will be seen that the amendments and the specific provisions relating to rice remove from these cases any basis for virtually all of the contentions relating to delegation of power which were made by the taxpayers in the *Butler* case.[26]

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[26] Petitioners in their brief in these cases content themselves for the most part with attacking the provisions of the Act prior to its amendment, failing to observe that many of these provisions can have no possible bearing in these cases by reason of the amendments and the specific provisions relating to rice. The questions of delegation under the original Act are fully treated in the Government's brief in the *Butler* case, and since these questions are not germane

(A) THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED, AND THE SPECIFIC PROVISIONS THEREOF RELATING TO RICE DO NOT INVOLVE ANY UNLAWFUL DELEGATION OF LEGISLATIVE POWER TO THE SECRETARY OF AGRICULTURE

In the *Butler* case, *supra,* the contentions are made that under the original Agricultural Adjustment Act, legislative powers were delegated to the Secretary of Agriculture in the following particulars: (1) In connection with the initiation of the tax; (2) in the selection of the subject matter of the tax; (3) in connection with the fixing of the rate of the tax; (4) in connection with the termination of the tax; and (5) in respect of his power to spend the proceeds derived from the tax. We will show that the basis of these contentions has been removed by the amendments and the specific provisions relating to rice.

1. No legislative powers have been delegated to the Secretary of Agriculture with respect to the initiation of the tax

Section 9 (a) of the Act, as amended by Section 11 of the Act of August 24, 1935, provides generally that the processing taxes levied thereunder

here, the arguments there made are not repeated here. Petitioners have also attacked certain provisions of the Act that do not and could not possibly affect them—for example, Sections 8 (1), 11 and 15 (a). Under familiar rules such contentions may not be urged here. In the ensuing discussion it will be shown that none of the provisions, insofar as they affect these petitioners, contain any delegation of legislative authority.

shall become effective as to the processing of any given commodity when the Secretary of Agriculture determines that rental or benefit or other payments shall be made in reference thereto under the authority conferred by Section 8 of the Act. When the Secretary makes such a determination he is required to proclaim his findings and thereupon the tax becomes effective from the beginning of the next succeeding marketing year. In the *Butler* case it is urged that these provisions give the Secretary power to initiate the tax. Such an argument cannot apply in these cases.

Section 9 (a) of the Act, as amended by Section 1 of the Act of March 18, 1935, specifically provides that in the case of rice the Secretary of Agriculture shall, before April 1, 1935, proclaim that rental or benefit payments are to be made in respect thereto. The same provision further specifically provides that the processing tax in respect to rice shall be in effect on and after April 1, 1935. Section 3 of the Act of March 18, 1935, specifically provides that the processing tax in respect to rice shall be in effect for the period from April 1, 1935, to July 31, 1936. This provision now appears as Section 9 (b) (3) of the Act, in accordance with Section 12 of the Act of August 24, 1935. Thus, it is seen that in the case of rice, Congress itself has specifically provided when the tax should go into effect. Consequently, the contention of the taxpayers in the *Butler* case, that the power to initiate the tax was unconstitutionally delegated to the Secretary of

Agriculture, has no basis in the instant cases because of the specific provisions of the Act as amended.

2. No legislative powers have been delegated to the Secretary of Agriculture with respect to the selection of the subject matter of the tax

Section 11 of the Act specifies several basic agricultural commodities, and in the *Butler* case, the taxpayers contended that the power to select the subject matter of the tax was unlawfully delegated to the Secretary of Agriculture, because the tax would not become effective as to the processing of any specific agricultural commodity named in Section 11, unless and until the Secretary made his finding of fact and issued his proclamation under Section 9 (a) of the Act. No basis for such a contention exists in the instant cases.

As has been pointed out above, the Secretary is under an expressed mandatory duty, prior to April 1, 1935, to issue a proclamation that he will make rental and benefit payments in respect to rice. It has also been pointed out above that Congress has specifically made the processing tax in respect to rice effective on April 1, 1935. By Section 3 of the Act of March 18, 1935, Congress imposed the processing tax with respect to rice at the rate of one cent per pound of rough rice. Section 12 of the Act of August 24, 1935, adopted this provision. By Section 4 of the Act of March 18, 1935, Congress specifically set forth the manner for the determination

of the weight of rough rice. By Section 9 (d) (7) of the Act as added by Section 6 of the Act of March 18, 1935, the term "processing" is defined as used in reference to rice. It is apparent, therefore, that no question of delegation arises with respect to the subject matter of the tax.

3. No legislative powers have been delegated to the Secretary of Agriculture with respect to the determination of the rate of the tax

The only objections which the petitioners can raise respecting delegation of legislative power to the Secretary of Agriculture in reference to the rate of the tax must be directed to either (a) the initial rate of tax, (b) the adjustment downward of the rate, or (c) the adjustment upward of the rate. Each of these situations will be considered in the order named.

(a) The Secretary Has No Power to Fix the Initial Rate of the Tax

Section 9 (b) of the original Act, to which most of petitioners' attention is directed, fixed the rate of the processing tax at such rate as equaled the difference between the current average farm price for the commodity and the fair exchange value of the commodity. This placed upon the Secretary the duty of fixing the tax rate for each basic commodity with respect to which he proclaimed that rental and benefit payments are to be made. This is not true with respect to

rice. Section 3 of the Act of March 18, 1935, specifically provides that the processing tax with respect to rice "shall be at the rate of one cent per pound of rough rice." This provision now appears as Section 9 (b) (3) of the Act, in accordance with Section 12 of the Act of August 24, 1935. It is obvious, therefore, that no power has been delegated to the Secretary with respect to the fixing of the original tax rate, and petitioners' suggestion that the Secretary has this power is obviously without merit, not only with respect to rice, but with respect to the other commodities, the specific rate of which is fixed by Congress in paragraphs (b) (2), (4), and (5) of the Act as amended August 24, 1935.

(b) The Power of the Secretary to Adjust the Rate Downward

The taxes here involved were computed at the specific rate fixed by Congress under Section 9 (b) (3), *supra*. No adjustment whatever has been made in the rate prescribed by Congress. The petition for certiorari herein filed shows that the taxes complained of were computed on the basis of the one-cent rate fixed by Congress (Pet. 3). Since no action has been taken by the Secretary to change or in any manner affect the rate of the tax, petitioners have not been affected by those provisions of the Act as amended, providing for adjustment in the rate. Consequently, the question of the va-

lidity of such provisions is not properly involved here.[27]

In any event no question of delegation of legislative power arises with respect to the adjustment of the tax rate.

The only power to adjust the tax rate downward is prescribed in Section 9 (b) (6) (A).[28] That

[27] See *Walsh* v. *Columbus, etc., Railroad Co.*, 176 U. S. 469; *Smiley* v. *Kansas*, 196 U. S. 447, 457; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 242; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576; *District of Columbia* v. *Brooke*, 214 U. S. 138, 149, 152; *Yazoo & Miss. R. R.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Brazee* v. *Michigan*, 241 U. S. 340, 343–344; *Gorieb* v. *Fox*, 274 U. S. 603, 606; *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 287; *Massachusetts* v. *Mellon*, 262 U. S. 447, 488; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 42; *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 186; *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 234–235; *Stephenson* v. *Binford*, 287 U. S. 251, 277; *Hicklin* v. *Coney*, 290 U. S. 169, 172; *Louis. & Nash. R. R. Co.* v. *Finn*, 235 U. S. 601, 610; *United States* v. *Sullivan*, 274 U. S. 259, 264; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 180–181. The same holds true with respect to Sections 11 and 15 (a), neither of which has been applied to rice. Moreover, as we shall show later, these two sections are relief provisions, and petitioners are in no position to object thereto. And in any event, neither of these sections contains any unlawful delegation of legislative authority.

[28] It is not true, as petitioners suggest, that under Section 9 (a) the Secretary may adjust the rate upward and downward at will. That provision applies only to the basic commodities not now subject to tax and not to the commodities the rate of tax on the processing of which is fixed in paragraphs (2) to (5), inclusive, of subsection (b) of Section 9, including rice. Furthermore, even in those cases, this provision requires all adjustments made under its terms to be in accordance with the provisions of subsection (b), which prescribes in detail the only method by which adjustments are to be made.

subdivision (A) provides that the specific rate of one cent per pound on the processing of rough rice—

> shall be decreased (including a decrease to zero) in accordance with the formulae, standards, and requirements of paragraph (1) of this subsection, in order to prevent such reduction in the quantity of such commodity or the products thereof domestically consumed as will result in the accumulation of surplus stocks of such commodity or the products thereof or in the depression of the farm price of the commodity, and shall *thereafter* be increased in accordance with the provisions of paragraph (1) of this subsection *but subject to* the provisions of subdivision (B) of this paragraph (6). (Italics supplied.)

It will be noted that all decreases in the tax rate must be made in accordance with the provisions of paragraph (b) (1) of Section 9 and that all increases must be in accordance with the same provisions of paragraph (b) (1), but *subject* to the provisions of (b) (6) (B). It will also be noted that under subdivision (A) there can be no increase in the rate of tax unless there has been first a decrease in the tax rate, and it will be noted that the Secretary has no power to decrease the rate except pursuant to findings that the tax, the rate of which has been fixed by Congress, is causing, or will cause, such a decrease in consumption as will result in the accumulation of surplus stocks or depression

in the farm price of rice after notice and opportunity for hearing. It is clear that petitioners' contention that the Secretary may decrease the rate at will is without merit. He may decrease only if he finds the foregoing facts and then only after notice and opportunity for hearing.

As pointed out above, there has been no adjustment in the tax rate, but, had any such adjustment been made, the first adjustment must have been a decrease. Any downward adjustment of the rate would not be the imposition of additional taxes but a partial relief from existing taxes. A statute which "grants the taxpayer the *benefit* of discretionary action" by an administrative official has been upheld by this Court, even though the statute was construed to preclude judicial review of the exercise of broad discretion there involved. *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502, 508. See also *Williamsport Co.* v. *United States*, 277 U. S. 551; *Blair* v. *Oesterlein Co.*, 275 U. S. 220. We submit, therefore, that petitioners are not in a position to question the beneficial provisions of the statute insofar as they relate to downward adjustments in tax rates.[29] In any event, as we shall show later, pp. 101–104, *infra*, the primary standards contained

[29] This is equally true with respect to Sections 11 and 15 (a), to which petitioners devote much attention. Section 11, after enumerating the basic commodities, provides that the Secretary shall exclude from the operation of the tax, during any period, any such commodity, if he finds, upon investigation, and after notice and opportunity for hearing, that the conditions of production, marketing and

in subdivision (b) (1), as relating to downward adjustments, are sufficiently definite so that no question of delegation of legislative authority is involved.

(c) The Power of the Secretary to Adjust the Rate Upward

The conditions attached to an upward adjustment of a tax rate are different from those attached to a downward adjustment in two respects. First, under Section 9 (b) (6) (A) an increase can be made only after a decrease. As stated above there has been no adjustment whatever so far as rice is concerned. Second, while a *decrease* in rates must be in accordance with the formulae, standards and conditions of 9 (b) (1), an *increase* under (A) must conform to certain additional conditions.

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consumption are such that during said period the Act cannot be effectively administered with respect to such commodity. Section 15 (a) provides that if at any time the Secretary finds, upon investigation and after due notice and opportunity for hearing, that any class of products of any commodity is of such low value, considering the quantity of the commodity used for their manufacture, that the imposition of the tax would prevent the use of the commodity in the manufacture of such products and thereby substantially reduce consumption and increase the surplus of the commodity, then the Secretary may cause the tax to be suspended or refunded. As stated above, neither of those sections has been used in the case of rice, and it is apparent that both sections grant relief from taxation and for this reason are unobjectionable. See also the argument at pp. 105–106 of the Government's brief in the *Butler* case, which is applicable here. In any event, it is submitted the directions are sufficiently definite so that no question of delegation is involved.

Section 9 (b) (6) (A) provides that after a decrease in the rate, such rate "shall thereafter be increased in accordance with the provisions of paragraph (1) of this subsection *but subject to* the provisions of subdivision (B) of this paragraph (6)." (Italics supplied.) We read this provision to mean that before any *upward* adjustment can be made the conditions of subdivision (B) must be met.[30]

Subdivision (B) provides:

> (B) If the average farm price of any commodity the rate of tax on the processing of which is prescribed in paragraph (2), (3), (4), or (5) of this subsection or is established pursuant to this paragraph (6), during any period of twelve successive months ending after July 1, 1935, consisting of the first ten months of any marketing year and the last two months of the preceding marketing year—
>
> (i) is equal to, or exceeds by 10 per centum or less, the fair exchange value thereof, or, in the case of tobacco, is less than the fair exchange value by not more than 10 per centum, the rate of such tax shall (subject to the provisions of subdivision (A) of this paragraph (6)) be adjusted, at the beginning

[30] It is to be noted that subdivision (D) of paragraph 9 (b) (6) provides that the specific tax rates may be adjusted upward in accordance with the formulae, standards, and conditions of Title I of the Act. Obviously, this means in accordance with the formulae, standards, and conditions of Section 9 (a) (6) (A) and (B), since all provisions must be read together and in harmony.

of the next succeeding marketing year, to such rate as equals 20 per centum of the fair exchange value thereof.

(ii) exceeds by more than 10 per centum, but not more than 20 per centum, the fair exchange value thereof, the rate of such tax shall (subject to the provisions of subdivision (A) of this paragraph (6)) be adjusted, at the beginning of the next succeeding marketing year, to such rate as equals 15 per centum of the fair exchange value thereof.

(iii) exceeds by more than 20 per centum the fair exchange value thereof, the rate of such tax shall (subject to the provisions of subdivision (A) of this paragraph (6)) be adjusted, at the beginning of the next succeeding marketing year, to such rate as equals 10 per centum of the fair exchange value thereof.

It is apparent from these provisions that the taxes here involved could not have been changed to the detriment of petitioners. This subdivision contains certain conditions precedent to an upward adjustment that are not present and could not be present in these cases.

The first element required by this subdivision is a time element. Before there can be an increase, there must be a period of twelve successive months ending after July 1, 1935, during which the average farm price of a commodity is equal to or exceeds the fair exchange value thereof. This twelve months' period must consist of the first ten months

of any marketing year and the last two months of the preceding marketing year. The marketing year for rice is definitely fixed in the statute as the period from August 1, to July 31, both inclusive.[31] Therefore no increase could be made in this case unless during the first ten months of the marketing year beginning August 1, 1935, and the last two months of the marketing year ending July 31, 1935, the average farm price was equal to or exceeded the fair exchange value. Hence, under this time element alone, no increase could be made in the rate of the processing tax on rice until August 1, 1936. Such a rate would not become effective until "the beginning of the next succeeding marketing year" after May 31, 1936, under the provisions of subdivision (B) (i), (ii), and (iii). Hence any adjustment upward of the rate, assuming there had first been a decrease, would not be effective until August 1, 1936. Hence, the taxes here involved were not and could not have been changed to the detriment of the petitioners. These petitioners cannot be heard to complain concerning a provision which could only operate prospectively as to some future marketing year and which has not and could not be used to their detriment during the current market-

[31] Section 9 (a) of the Act as amended by Section 2 of the Act of March 18, 1935. In the *Butler* case the contention is made that the Secretary of Agriculture is given legislative powers with respect to fixing the marketing year. The above amendment clearly removes the basis for any such contention in this case.

ing year or in reference to taxes here involved. See authorities cited, *supra,* footnote 26.

In any event the formula prescribed by subdivision (B) involves the exercise by the Secretary of no legislative powers. He is to determine only the average farm price and the fair exchange value. As pointed out in the Government's brief in the *Butler* case (pp. 49–57), the determination of these two factors from available statistics of the Department of Agriculture, involves simple mathematical computations and presents no question of legislative powers.[32]

[32] It is to be noted that the definition "fair exchange value" in Section 9(c) of the original Act was amended by Section 13 of the Act of August 24, 1935, to include the price that "will also reflect interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during said base period." The addition of these two items in the "fair exchange value" did not make the computation of that figure any the less certain and definite. Statistics previously collected by the Bureau of Agricultural Economics show these items as well as the "articles farmers buy." These figures are available not only for the base period (August 1909 to July 1914), but for current years as well. See Index Numbers of Prices, Taxes and Interest Payable by Farmers, September, 1934, and August, 1935, United States Department of Agriculturae, Bureau of Agricultural Economics. There is, of course, no merit to petitioners' contention that the Secretary is given unlimited authority to determine the base period. Section 2 (1) of the Act definitely defines the base period as the period from August 1909 to July 1914, except in the case of tobacco and potatoes, where the period is fixed at August 1919–July 1929. Section 8 (c) referred to by petitioners relates exclusively to marketing agreements and can have no possible bearing in this case.

As stated above, we construe Section 9 (b) (6) (A) to mean that no upward adjustment in the tax rate can be made unless and until the provisions of subdivision (6) (B) are met. We have already shown that the provisions of that subdivision which are conditions precedent to an upward adjusment are not and could not be present in these cases.

It has been suggested, however, that subdivision (6) (B) is not the only authority to raise rates. Subdivision (6) (D) provides that the specific rates on rice or the rate prescribed by this paragraph (6) shall be increased "in accordance with the formulae, standards, and requirements prescribed in this title." It is said that under this provision rates may be raised during the current marketing year without regard to subdivision (6) (B). But subdivision (6) (D) refers to the formulae, standards, and conditions prescribed in "this title." "This title" includes subdivision (6) (B), which is most certainly a formula and a very important one, since it provides the specific tax to be effective, to *maintain* the gains under the Act, notwithstanding the fact that "parity" has been temporarily reached. Thus it seems clear to us that the conditions of subdivision (6) (B) govern the upward adjustment of rates. Those conditions, as we have shown, are not applicable and could not be applicable to these processors prior to August 1, 1936. Further support for the view that any increase in rate is subject to the formula contained

in subdivision (6) (B) is to be found in subdivision (6) (F), which provides that after July 31, 1936, in the case of rice, "rates of tax shall be determined by the Secretary of Agriculture in accordance with the formulae, standards, and requirements prescribed in this title *but not in paragraph (6)*." It is reasonable to assume that had Congress decided that, prior to July 31, 1936, rates might be increased without regard to (6) (B), it would have employed in (6) (D) language similar to that employed in (6) (F).

But even if we assume that subdivision (6) (D) authorizes an increase without regard to subdivision (6) (B), such increase even under that authority must be in accordance with the requirements of "this title"; that is, in accordance with the requirements of subsection (b) (1).[33]

Under subsection (b) (1), there is a definite limit to the upward adjustment of the rate. The increase shall not be higher than the definite rate prescribed in the first sentence of paragraph (b) (1). That rate is the difference between the current average farm price and the fair exchange value, plus a percentage up to 20 percent of this difference, as the Secretary may determine will result in the collection of an amount of tax equal to estimated refunds allowable under Sec-

[33] There is, of course, no merit to petitioners' contention that under Section 9 (a) the Secretary can increase the rates at will. That Section requires that the rate of tax

tion 15 (c)[34] and estimated exemptions allowable to state instrumentalities.

Thus, if the current average farm price is fixed at 100 and the fair exchange value at 160, the tax rate could not be adjusted upward to more than 72, that is the difference between the current average farm price and the fair exchange value plus a percentage of not more than 20 percent of the difference to take care of estimated refunds, credits, and tax exemptions. It is seen, therefore, that the upward adjustment is definitely limited and this limit is definitely ascertainable.[35] There is a definite level or "ceiling" beyond which the Secretary may never go.[36]

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shall *conform to the requirements* of subdivision (b). The rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to *conform to such requirements.* Clearly this permits the Secretary to adjust only in accordance with subsection (b). It is to be observed that under subdivision (6) (F), the formula in subsection (b) (1) are alone applicable after July 31, 1936, in the case of rice.

[34] Section 15 (c) provides for refunds to persons delivering to charitable organization products with respect to which a processing tax has been paid.

[35] As pointed out above p. 97, current average farm price and fair exchange value are matters of mathematical computations, ascertainable from available records in the Department of Agriculture. The less important factors of estimated credits, refunds, and tax exemptions may be determined from statistics and other information based on past experience.

[36] Of course there is no merit to petitioners' contention that under Section 9 (a) the Secretary can raise the rate to

Considering this limit on the upward adjustment of the tax rate in connection with the positive direction of Congress set forth in subsection (b) (1), it is submitted that no abdication of legislative powers is to be found in that subsection.

The directions in subsection (b) (1) are that, if the Secretary of Agriculture has reason to believe that the one cent rate on rice will cause or is causing such a reduction in rice consumption as will result in an accumulation of surplus stocks of rice or in the depression of the farm price, then he shall cause an appropriate investigation to be made, and afford due notice and opportunity for hearing to interested parties. If, thereupon, the Secretary determines and proclaims that any such result will occur or is occurring, then the processing tax shall be at such lower rate as he determines and proclaims will prevent such accumulation of surplus stocks and depression of the farm price. After such a decrease, subsection (b) (1) provides that the tax shall remain at such lower rate

> until the Secretary, after due notice and opportunity for hearing to interested parties, determines and proclaims that an increase in the rate of such tax will not cause such accumulation of surplus stocks or depression of the farm price of the commodity.

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a point above this limit. Section 9 (a) provides that all adjustments shall "conform to the requirements of subsection (b)." Furthermore, subsection (a) is not applicable to rice.

> Thereafter the processing tax shall be at the highest rate which the Secretary determines will not cause such accumulation of surplus stocks or depression of the farm price of the commodity, but it shall not be higher than the rate provided in the first sentence of this paragraph.

Thus, both the decrease and the subsequent increase are governed by very definite directions. He cannot, as petitioners suggest, adjust the rate at will. He must, after hearings and investigation, fix the rate at a figure that will not cause such a reduction in domestic consumption of rice as will result in an accumulation of surplus stocks or depression in farm price. We submit the "primary standard" here set forth is sufficiently definite so that no question of unlawful delegation is involved.

Congress obviously patterned the procedure to be followed here upon the provisions of the present Tariff Act, the precursor of which was sustained in *Hampton & Co.* v. *United States,* 276 U. S. 394.[37] An investigation involving hearings and notice is required here as it was in that Act. It is submitted that the determination required is of no less certainty than that required by the Tariff Act of 1922 and is equally within the special competence of the experts of the Department of Agriculture as the

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[37] See H. Rep. No. 6, 73d Cong., 1st Sess., p. 5: "In their legal aspects these flexible tax provisions are similar to the provisions of the Tariff Act of 1930 providing for the flexible tariff."

determination under the Tariff Act was within that of the Tariff Commission.

Tendencies toward reduction in consumption caused by a high rate of tax are found by observation of the curve of consumption over a period as compared with the curve of increase in costs. The likelihood of accumulation of surplus stocks and consequent depreciation of farm price is determined from the trend of these curves and from statistics showing certain results when these curves reach a certain point; for example, the use by manufacturers of substitutes or a decrease in purchases by consumers. By the use of these statistics and the information and facts gathered at the hearings provided for by the statute, the Secretary is enabled to determine with sufficient certainty the facts upon which Congress has made the rate to depend. Should it be impossible for the Secretary to determine whether any reduction in consumption will result, clearly the tax must remain at the rate provided for in the Act.

The standards and directions set forth in this subsection would appear to be as definite as many standards heretofore sustained by this Court. *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 285 (public convenience, interest, or necessity); *Avent* v. *United States*, 266 U. S. 127, and *United States* v. *Chemical Foundation*, 272 U. S. 1 (in the public interest); *Tagg Bros.* v. *United States*, 280 U. S. 420 (just and reasonable commissions); *Buttfield* v. *Stranahan*, 192 U. S. 470 (purity, quality,

and fitness for consumption); *Union Bridge Co.* v. *United States,* 204 U. S. 364 (unreasonable obstruction to navigation); *Wayman* v. *Southard,* 10 Wheat. 1 (in their discretion deemed expedient); *Mahler* v. *Eby,* 264 U. S. 32 (undesirable resident). Cf. *United States* v. *Shreveport Grain & El. Co.,* 287 U. S. 77, 82, sustaining the validity of a provision in the Food and Drugs Act giving authority to administrative officers "to make rules and regulations permitting reasonable variations from the hard and fast rule of the Act."

In any event, assuming subsection (b) (1) does contain an unlawful delegation of legislative authority, petitioners are not in a position to object thereto. We have already shown that no adjustment whatever has been made as to rice. We have also shown that, in our view, subsection (b) (1) is not applicable and that the unobjectionable provisions of subparagraph (6) (B) control all upward increase. But aside from all this, and assuming the applicability of (b) (1) and assuming that petitioners may object thereto, and further assuming that subsection (b) (1) does delegate legislative authority, still it is to be noted that this provision is entirely separable from the rest of the Act. It is significant that since March 18, 1935, no adjustments have been made with respect to rice.[38]

[38] In fact no adjustment has been made with respect to any of the basic commodities, since the adoption of the amendment of August 24, 1935, except in the case of tobacco. There the provisions of subdivision (6) (B) were applicable and were applied. Tobacco Regulations, Series 1, No. 3.

This indicates that the adjustment in the rice taxes is not necessary. By Section 14 of the Act Congress has said that if any provision of the Act is declared invalid, the validity of the remainder shall not be affected thereby. It is plain that if the adjustments provisions were eliminated "a workable plan" for the raising of revenue "would still remain." See *Weller* v. *New York,* 268 U. S. 319, 325. Cf. *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210, 235.

Moreover, subdivision (G) of paragraph (6) provides that, if the Secretary adjusts the rate of tax under the powers given him by paragraph (6), and if such action is held invalid by reason of any provision of the Constitution, or by reason of the fact that the Secretary wrongfully exercised or failed to exercise any of his powers, then *the rates of tax fixed by paragraphs (2), (3), (4), or (5) shall remain in effect until altered by Congress.* Thus, even if the adjustment provisions be unconstitutional, petitioners cannot be heard to complain, since the one-cent rate, which is fixed by Congress and which has not been altered, would continue to be the rate.

We submit the rate-adjustment provisions contain no abdication of legislative powers; and even if they did, petitioners are not in a position to urge their invalidity.

4. *No legislative powers have been delegated to the Secretary of Agriculture with respect to the termination of the tax or with respect to the spending of the revenues derived from the tax*

In the Government's brief in the *Butler* case it is pointed out (pp. 105–106) that the taxes are not invalid by reason of the provision respecting the termination thereof. Furthermore, in the case of rice, Section 3 of the Act of March 18, 1935, adopted by Section 12 of the Act of August 24, 1935, specifically provides that the processing tax in respect to rice shall be in effect for the period from April 1, 1935, to July 31, 1936. If a rate of tax is determined by the Secretary of Agriculture pursuant to the formula of Section 9 (b) (1) on or after August 1, 1936, and if such action is deemed to have been taken pursuant to a delegation of legislative power, then the rate of tax of one cent per pound fixed by Congress remains in effect until ordered by Act of Congress. (Subdivision 9 (b) (6) (G).) These provisions maintain unless the tax is terminated by proclamation of the President or of the Secretary of Agriculture. With respect to any termination by the Secretary, it is to be noted that, under Section 8 (4) of the Act, added by the amendments of August 24, 1935, the proclamation of the Secretary under Section 9 (a) which will terminate the tax, may be issued only after a notice and opportunity for hearing to interested parties and a finding of the facts required therein to be found.

It is also shown in the Government's brief in the *Butler* case (pp. 90–101) that after an appropriation by Congress, the expenditure of public funds is an executive and not a legislative function and hence the discretion involved in the making of rental and benefit payments could not involve the legislative powers. For the reasons there discussed, we submit no question of delegation arises with respect either to the termination of the tax or with respect to the spending of the revenues derived from the tax.

From the foregoing it is seen that the basis of many of the objections raised by the taxpayers in the *Butler* case, with respect to the question of delegation, have been removed by the amendment to the Agricultural Adjustment Act, and by the specific provisions relating to rice. We respectfully urge that no unlawful delegation of legislative authority is involved in these cases. The tax being otherwise valid for the reasons set forth at length in the Government's brief in the *Butler* case, it is submitted that no basis exists to enjoin the collection of these taxes.

CONCLUSION

The decisions below should be affirmed.

Respectfully submitted.

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